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IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS

FIELD HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

APRIL 6, 2015—ANCHORAGE, AK

Printed for the use of the Committee on Environment and Public Works

Available via the World Wide Web: http://www.gpo.gov/fdsys

U.S. GOVERNMENT PUBLISHING OFFICE

95–764 PDF WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS

MONDAY, APRIL 6, 2015

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE,
Anchorage, AK.

OPENING STATEMENT OF HON. DAN SULLIVAN, U.S. SENATOR FROM THE STATE OF ALASKA

Senator SULLIVAN. Good morning, everybody.

The Subcommittee on Fisheries, Water, and Wildlife, under the Environment and Public Works Committee of the U.S. Senate will now come to order.

I'm Senator Dan Sullivan, junior Senator from Alaska. I want to welcome everybody to this important hearing. I also want to give you kind of a little bit of an overview of how we're going to conduct the hearing today.

We're going to start—we're actually going to have two panels: Michelle Hale, from the State of Alaska, will be testifying first; and then we're going to take a quick recess and have a much larger panel, of several Alaskans who represent different organizations, who will be testifying in the second panel.

I appreciate everybody coming here today, and we will begin with my opening statement on the very important issue of the impacts of the proposed "Waters of the U.S." rule on State and local governments.

So, good morning, again, and thanks for being here to discuss the proposed "Waters of the U.S." rule issued by the EPA. I know that some of you have traveled very far to be here. We actually have staff from Washington, DC, both majority and minority staff on the EPW Committee. I very much appreciate everybody coming to this important hearing.

In Washington, DC, we have held several hearings with the EPA administrator, the assistant secretary of the Army, the State government representatives and stakeholders on this proposed rule.

This hearing is a continuation of these efforts. It will also give voice to a cross section of Alaskans on this rule and its possible impacts. And as Alaskans, we are the State that certainly will be most impacted by this rule.

Beyond those testifying today, the subcommittee will hear from the Farm Bureau, the Associated General Contractors, the Alaska Miners Association, the mayor of the North Slope Borough, State Senator Click Bishop, and the Citizens' Advisory Commission on Federal Areas in a hearing on Wednesday in Fairbanks. They will join three-fifths of the States who have now indicated opposition to the proposed rule and more than 300 trade groups and associations from across the Country.

I also think it's very important to make sure that as we conduct these hearings, it's not just citizens coming to Washington, DC, to hear concerns and address their concerns but Washington, DC, coming to the States. And that's what we're trying to do today with this field hearing.

Alaska's no stranger to overreaching Federal agencies. However, it should be stressed that the proposed "Waters of the U.S." rule may be one of the most important, significant expansions of Federal jurisdiction we have seen to date in Alaska.

Unlike most of the Federal overreach that has impacted Alaska, the tentacles of the Clean Water Act extend far beyond simply Federal lands, and it would impact the ability of States and private landowners to use their land.

Already a huge percentage of Alaska falls under Federal Clean Water Act jurisdiction. Alaska has 43,000 miles of coastline, millions of lakes. More than 43 percent of our State's surface area is composed of wetlands, which accounts for 65 percent of all the wetlands in the United States.

Let me be clear: There is no doubt that many of these lakes and rivers, such as the Yukon, Susitna and other tributaries, are jurisdictional under the Clean Water Act. No one is suggesting otherwise; instead, we're here to talk about the regulations of waters that Congress never intended to be jurisdictional.

Alaska has some of the cleanest waterways in the world, leading to our vibrant, world-class fisheries and award-winning drinking water. Concerns over this rulemaking, with regard to the "Waters of the U.S.," are not at all aimed at jeopardizing these characteristics that are fundamental to the identity of Alaska; instead, our efforts are about clarifying jurisdiction and pushing back on Federal agencies that are asserting authority over even more features, such as roadside ditches, culverts, stormwater systems, isolated ponds and activities on adjacent lands, bypassing Congress, and ducking Supreme Court rulings.

Regardless of this rule, discharges of pollutants into these features would remain subject to Clean Water Act regulation. However, if the rule is finalized in its current form, it would mean that many Alaskans could be subject to having to get a permit from the EPA in order to dig ditches even in their own back yard. It would mean that a farmer might have to get a permit to plow new land. It would mean that harbors, roads, weed and pesticide control, and certainly natural resource development, would fall under even more extensive Federal permitting processes, effectively granting the EPA power to dictate energy and infrastructure policy in most of Alaska.

This is not hyperbole. Just ask the Idaho couple who wanted to build a house on just over half an acre that happened to be near

a lake. The EPA determined that their property was a wetland and forced them to stop development and rehabilitate the property to its natural state or face fines of $75,000 a day. With this rulemaking, more landowners across the U.S. would be subjected to similar treatment.

Just a couple weeks ago, the Senate passed, by strong, bipartisan vote, an amendment that I co-sponsored with Senator John Barrasso of Wyoming that would rein in the scope of this rulemaking. This amendment was an important, bipartisan step as we craft legislation to ensure that the Clean Water Act is focused on maintaining water quality. We sent a strong message through the Senate that the Clean Water Act should not be transformed into a tool to expand the authority of the EPA and control entirely unrelated activities.

Thank you again for being here. We have several witnesses, who will be presenting on both sides of this issue. We want to hear all views here today in Alaska.

And I want to ask our first witness, Michelle Hale, Director of the Division of Water at the Department of Environmental Conservation for the State of Alaska, to please take the stand on the witness dais and present her testimony.

Miss Hale.

STATEMENT OF MICHELLE HALE, DIRECTOR, DIVISION OF WATER, ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Ms. HALE. Good morning. My name is Michelle Hale, and I'm Director of the Division of Water of the Alaska Department of Environmental Conservation. My commissioner, Larry Hartig, was supposed to have been here, but he was needed down in Juneau today. There's a lot going on down in Juneau.

The State of Alaska has submitted comments to the U.S. EPA and the Army Corps of Engineers, and I've submitted those comments for the record, as well.

So the State of Alaska believes that the "Waters of the U.S." rule will lead to a significantly larger number of waters and wetlands that are subject to Federal jurisdiction that will be considered "jurisdictional" and will require permits for development and also require expensive compensatory mitigation.

The high costs are already borne by all permittees, and they'll be higher once this rule goes into effect, we believe. That's our understanding of the rule.

Currently the Army Corps of Engineers takes about 6 months to issue a standard dredge and fill permit. For larger projects, that can be many years. So, in addition to high costs and permitting and compensatory mitigation, often those costs include missing entire seasons of development opportunity. That will continue under the rule and become worse.

As you said, Senator Sullivan, Alaska has more coastline than all the other States, all the other lower 48 States combined. Alaska has more than 3 million lakes and more than 15,000 streams that support anadromous fish. We also have somewhere between 130 million and 170 million acres of the wetlands, as you say. More

than a third, close to a half of the State is wet, and that's, again, more wetlands than all the other States combined.

This information just demonstrates that Alaska has more at stake for this rulemaking. This rulemaking has more potential impacts on Alaska than any other State. Yet, the published "Waters of the U.S." rule was based on a Connectivity Study; a draft Connectivity Study that made only glancing reference to Alaska, contained no reference to permafrost, no reference to tundra.

We commented significantly on that report, and in the final report they did make more references to Alaska, but astonishingly, as we're all accustomed to the maps in the report, eliminated both Alaska and Hawaii. We're not even included in any of the maps in that draft—in that final connectivity report.

EPA and the Corps failed to adequately consult with the States in the development of the rulemaking and the process for the development of that rulemaking is flawed. The published rule was published before the Connectivity Study was final. So, before any of that information about Alaska was able to make it into the rule, it was used to support the draft rulemaking.

Interestingly, I'll use the national Office of Management and Budget's own words and quote that "when an information product, like the Connectivity Study, is a critical component of lawmaking, it is important to obtain peer review before the agency announces its regulatory options, so that any technical corrections can be made before the agency becomes invested in a specific approach and the positions of interest groups have hardened."

We have commented at every opportunity on both the Connectivity Study and the rulemaking. We commented on the Connectivity Study, we sent somebody to Washington, DC, to testify orally before the Science Advisory Board, we have commented on the draft rulemaking, and our comments seem like they're falling on deaf ears. We're not hearing anything in response to those comments.

The rule doesn't account for regional differences and it doesn't seem to account for any of the uniqueness of Alaska. It might be EPA's intent to finalize the "Waters of U.S." rule and then attempt to implement it in ways that will work in Alaska, but this is unacceptable for us. If that happened, there would have to be Alaska-specific guidance, and that guidance would have to go through some kind of a public process. That public process would have to take into account Alaska's concerns. However, the EPA's and the Corps' track record on this is not very good. They don't seem to have been good at taking those concerns into account.

We have long protected our waters under statutory and regulatory authority. We've got more authority than the Federal Government has now to protect our waters. We don't believe there's any need to expand the Corps' and EPA's regulatory reach by increasing the numbers of waters that they regulate.

Thank you.

[The prepared statement of Ms. Hale follows:]

Michelle Hale
Director, Division of Water
Alaska Department of Environmental Conservation

Testimony on Proposed Waters of the U.S. rulemaking

before the

U.S. Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water and Wildlife
April 6, 2015

Good morning. My name is Michelle Hale, and I am the Director of the Division of Water in the Alaska Department of Environmental Conservation. Larry Hartig, Commissioner of DEC, was unable to attend today and has asked me to attend in his place.

The State of Alaska has submitted comments to the U.S. EPA and the U.S. Army Corps of Engineers. I have submitted a copy of these comments for the record.

The State of Alaska believes that the Waters of the U.S. rule will lead to a significantly larger number of waters and wetlands that are "jurisdictional" and that will require permits for development, further driving up already high costs of permitting and compensatory mitigation. These high costs are borne by all permittees, from large-scale developers to individual homeowners. The costs that will be borne as a result of this rule will affect the state, individuals, industry, municipalities, and the economy of the State of Alaska.

The Army Corps of Engineers' own permit data demonstrates that a standard individual permit for placement of fill in waters or wetlands takes almost 6 months to issue. For larger projects, this time can be much longer, years. Thus, the high costs of permits also includes delay costs as project proponents miss entire building season.

Alaska is unique

Alaska has more coastline than the lower 48 states combined. Alaska has more than three million lakes, and more 15,000 water bodies known to support anadromous fish. Estimates for wetlands in Alaska range from 130 to 170 million acres of wetlands. This is more than are found in all other states combined. Alaska's wetlands comprise more than a third of the surface area of the state. Just about everything we do here touches wetlands.

Alaska has more at stake relative to this rulemaking than any other state. Yet, the published Waters of the U.S. rule was based upon a draft Connectivity Study that made scarce reference to Alaska. It included no reference to permafrost or tundra. While the final report did contain some reference to Alaska, astonishingly, the maps of the U.S. included in the report eliminated both Alaska and Hawaii.

The rulemaking process is flawed

EPA and the Corps have failed to adequately consult with the States in the development of the rulemaking, and the rulemaking process itself is flawed. The proposed rule was published before the Connectivity Study – the one that made scarce reference to Alaska – was even peer-reviewed or finalized.

The national Office of Management and Budget itself observes that "when an information product is a critical component of rule-making, it is important to obtain peer review *before* the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened."

Alaska has commented at every opportunity on the connectivity study and the draft rulemaking, seeking recognition of the truly unique conditions and regional differences within Alaska, yet our voices seem to have fallen on deaf ears. Not only does the rulemaking not account for Alaska's uniqueness, it does not account for regional differences at all.

The rulemaking does not provide clarity

The intent of this rulemaking was to provide clarity in the wake of court rulings. But because the rulemaking appears to ignore Alaska's unique conditions, it is hard to see how it provides more clarity than the existing situation, which is not good. Rather, the rule could lead to even more confusion, with the potential for litigation even higher. Just this potential for error or litigation leads project proponents to pursue 404 permits they legally don't need.

It might be EPA's intent to finalize the WOTUS rule and then attempt to implement it in ways that match each State's circumstances, but this would be unacceptable. Alaska wouldn't know how the rule would apply in our state until after it had been adopted, after EPA issued Alaska-specific guidance. In order for Alaska's views to be considered, the guidance itself would have to go through a public rule-making process, and that process would have to be far more inclusive than the WOTUS rule-making process has been. The track record is not very good here.

EPA and the Corps have repeatedly held that the proposed rule provides clarity and does not expand the scope of WOTUS. The State of Alaska disagrees strongly on both counts.

The rulemaking unnecessarily expands EPA's and the Corps' regulatory reach

Alaska has long protected its water resources under state statutory and regulatory authority. There is simply no need to expand the Army Corps of Engineers' and EPA's regulatory reach by increasing the numbers of waters they regulate.

Senator SULLIVAN. Thank you, Ms. Hale. And I really appreciate you coming and testifying before the Committee today. I think it's very important for Alaskans to hear exactly what the State of Alaska's view is on this rule.

So let me just: More specifically, did we, in our specific comments to the EPA, did we propose that they withdraw the rule and start over?

Ms. HALE. Yes, that's one of the proposals. And we've also made a lot of comments specifically about components of the rule, as well.

Senator SULLIVAN. And do you think that—so were there any State officials involved in actually drafting the proposals?

Ms. HALE. No. There was what's called a "federalism consulting process" that EPA and the Corps kicked off in 2011, and that process lasted for a little more than a month. And it was supposed to be this process where States were involved in the development of the rule. But I participated in that and I found that it was more EPA and the Corps talking and States listening, and I did not find an opportunity for Alaska to actually provide our Alaska-specific comments and issues at that stage.

Senator SULLIVAN. So, and just for the record, I want it to be clear that Alaska has opposed the rule and asked for its withdrawal and is one of 34 States in the United States that is opposing the rule.

Are you familiar with what some of the other States' concerns are?

Ms. HALE. We've worked a lot with multi-State agencies and organizations, and a lot of the issues that we have are echoed throughout many States, particularly western States.

Senator SULLIVAN. And with regard to the Clean Water Act, I want to read a section that is very important.

Section 101(b) clearly states, "It is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator"—of the EPA—"in the exercise of his"—or her—"authority under this chapter."

Why do you think the sovereign State of Alaska was not treated as a critical contributor to the rulemaking, particularly during the public comment section; and, as you mentioned, importantly, the study, on which the rule was based, was promulgated to the public after the rule was issued? Could you address those two questions?

Ms. HALE. It's been our experience that the Federal Government thinks that they know how to regulate better than the State governments, and that probably answers the first question as well as I can. I don't remember the exact sequence of events, but I think that the way it worked was that a draft of the rulemaking was leaked, but that draft was leaked—and that was a complete draft—before that Connectivity Study was out. So there is some kind of sequence of events, but the rulemaking was intact before the Connectivity Study was released.

Senator SULLIVAN. But the rule itself is based on the Connectivity Study, correct?

Ms. HALE. Yes. It does seem to be a bit of a "cart before the horse," Senator Sullivan.

Senator SULLIVAN. So, again, just so everybody's clear, for the record: The Connectivity Study, upon which the rule is based, came out several months after the rule was proposed, correct?

Ms. HALE. It was finalized after the rule was proposed. The Connectivity Study—and again, I don't have the sequence of events, and I'll get back to you with that. But a draft of the rulemaking was leaked, I believe, before the final, or before the draft Connectivity Study was released. But again, I'll get back with you on the sequence of dates there.

Senator SULLIVAN. Great. Thank you.

And do you think that this rule, the way it was promulgated, the jurisdictional reach of it, do you think that—and the process, which I think is important for Alaskans to understand how it was promulgated, do you think that this is consistent with the spirit of the Clean Water Act provision that I read, Section 101(b), that talks about the policy of the Congress is to protect the primary responsibilities and rights of the States to manage Clean Water?

Ms. HALE. Our experience with EPA, in particular, especially at the headquarters level, is that this rarely happens, that they actually meaningfully consult with the States. We have a different relationship with our Region 10 counterparts——

Senator SULLIVAN. Right.

Ms. HALE [continuing]. Our EPA Region 10 counterparts in Seattle. We're often—when national rulemakings don't work in Alaska, they work closely with us. They recognize the uniqueness of the State. We rarely find that with headquarters rules.

Senator SULLIVAN. So one of the things that the EPA administrator and other officials in Washington, as you mentioned, have stated about this rule is that it's not intended to expand the jurisdictional reach of the EPA's authority under the Waters of the Clean Air Act, it's simply meant to clarify existing law.

Do you see this as a significant expansion of the EPA's jurisdictional authorities over waters in Alaska?

Ms. HALE. Senator Sullivan, as written, we are very concerned that it will lead to expansion of jurisdiction, yes.

Senator SULLIVAN. So I think that it's important for the record to indicate that your views are similar to the views of the Congressional Research Service, which in a report on March 27th, 2014, did say that this proposed rule would "increase the asserted geographic scope of Clean Water Act jurisdictions." And it goes into a whole host of areas where this would happen.

So, even the State of Alaska, but even the Congressional Research Service seems to be at odds with the administrator of the EPA and EPA officials, who have stated on the record, before this committee, that this rule does not seek or will not expand the jurisdiction of the "Waters of the U.S." But the State of Alaska believes otherwise; is that correct?

Ms. HALE. Senator, that is correct, yes.

Senator SULLIVAN. So I also want to talk just briefly, Ms. Hale. I know that Commissioner Hartig was going to be here originally, and again, I appreciate DEC testifying on this important issue.

As you know, Commissioner Hartig is certainly one of the most impressive, in my view, public servants in the State of Alaska, having now served consistently as the commissioner of DEC for over three different administrations in the State of Alaska.

And there was a case that Commissioner Hartig and I worked on, when we were both in State government. It ended up going all the way to the U.S. Supreme Court. It was called Utility Air Regulator Group v. EPA. It was about another EPA rule that dealt with the Clean Air Act in the State of Alaska, similar to this rule. We challenged that rule, because we thought that the EPA didn't have the authority to issue that rule.

That case went all the way to the U.S. Supreme Court, and in a decision last year, the Supreme Court reprimanded the EPA for exceeding its authority as an agency and actually ignoring the separation of powers, because it was undertaking authority that was the realm of the Congress, not a Federal agency.

I want to just briefly read what the Supreme Court stated with regard to that rule. They stated, "The rule,"—in that case, a Clean Air regulation—"would place plainly excessive demands on limited government resources, and that is alone a good reason for rejecting it; but that is not the only reason. The EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' "we"—the Supreme Court—"typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' "

Do you think that this rule would have significant economic impact on business interests or other interests, local communities, the State of Alaska; do you think it would have significant economic impact over such entities in the State of Alaska if this rule was promulgated?

Ms. HALE. Senator Sullivan, that is our read of the rule as it is proposed. We think that it could have impact on individuals, on corporations, on municipalities, on the State of Alaska, who, incidentally, the Department of Transportation, has the largest number of 404 permits and is thus affected by jurisdiction rules more than anyone, and we think that it would have—as written, we believe it would have an impact on the economy of the State of Alaska.

Senator SULLIVAN. So my view is, particularly given what you're talking about, that despite having had the Supreme Court just a year ago reprimand the EPA for taking over with regard to regulatory authority that they did not have, because there was not a clear instance of the Congress granting them that authority, that they're ignoring the Supreme Court, who issued this very important ruling just a year ago, that the State of Alaska was very involved with, and they're doing it again: They're issuing a regulation that has significant impact over the economy of the United States, the economy of Alaska, without congressional authorization.

Do you agree that that's what they're attempting to do with this rule?

Ms. HALE. Senator, I'm not an attorney, so I can't really speak from a legal point of view. I certainly agree that, as written and as proposed, the rule did seem like it would expand jurisdiction significantly.

I can get back to you, consult with my supervisors and with the commissioner and get back to you.

Senator SULLIVAN. Great. Thank you very much.

So, Ms. Hale, let me ask one other quick question: What can be done, now that the rule has been released, to ensure sufficient consultation with the States, that that consultation is taken seriously? It sounds like this is a pattern that the State of Alaska has been objecting to literally for years, and yet, we do not seem to get the consultation that is required and mandated from the statutes. What do you think can be done? And obviously, the State wants this rule to be withdrawn and to start over, but what else? Do you have any other suggestions with regard to what Congress can do in this regard?

Ms. HALE. Senator, I'm not certain exactly what Congress can do. I think we need to leave that to you. However, EPA and the Corps could restart and sit down and meaningfully discuss the Alaska-specific issues, really talk about what this kind of permitting means relative to permafrost and relative to tundra and relative to the state that we've got. They could meaningfully sit down, start over and sit down with us and actually consult with us so that we could come up with some kind of a joint way of addressing the questions that are raised by those Supreme Court decisions. They could also just exempt Alaska from the rule.

Senator SULLIVAN. Great. And let me ask one final question.

You talked about consultation, you talked about the process, the frustration the State of Alaska has had with regard to the EPA on this and other issues. There's many of us who believe that this rulemaking process was a clear example of Executive Order 13132, a very important executive order called the federalism executive order, that was not abided by in this process.

Let me give you a quote, and for the record, what portions of that federalism executive order state. "When undertaking to formulate and implement policies that have federalism implications, agencies shall"—Federal agencies shall—"in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority."

Do you believe that the EPA clearly abided by this federalism executive order, which they are required to do?

Ms. HALE. Senator, I can't speak to the exact letter of the law, but I can speak to the process that occurred. And I do not believe that the State of Alaska was meaningfully involved in the development of that rule and even the decision to make that rule, to develop that rule.

Senator SULLIVAN. Great.

Ms. HALE. We did not have an opportunity.

Senator SULLIVAN. Thank you for your outstanding testimony.

Please give my regards to Commissioner Hartig and the other members of DEC. You are doing great work for the State of Alaska.

I try to remind the EPA, the administrator and other senior members of the EPA in Washington, DC, that Alaskans love our environment. We care more about having a clean environment, clean water, pristine environment, than any Federal bureaucrat in Washington, DC, and I think DEC does a great job in representing the State. So I appreciate your testimony.

We are going to recess for a short 5 minutes, and we're going to call the next panelists to come to the dais for your testimony.

Thank you, Ms. Hale.

Ms. HALE. Thank you.

[Recess.]

Senator SULLIVAN. We are going to resume the hearing, and if all the witnesses will please have a seat at the dais.

So I just wanted to give just another quick little update here. As you see, we have a fantastic panel of witnesses, and I want to welcome all of them. We have witnesses from both sides of the debate here with regard to the rule. We certainly want to hear all views with regard to the proposed rule.

We have a setup that's a little unique here. So what we're going to do is, we're going to have each witness, when they're called, to present their testimony from the dais in front of the committee, and then when they're all—all the testimony is complete, we will conduct some questions and answers from the dais here.

So, again, I want to thank everybody for coming. You'll have 5 minutes. The witnesses will have 5 minutes to read their testimony. If there's longer written testimony, we can submit that for the record.

So for the first witness I'd like to have Tara Sweeney, the executive vice president for external affairs for ASRC, please proceed to the witness stand and present your testimony.

STATEMENT OF TARA SWEENEY, EXECUTIVE VICE PRESIDENT, EXTERNAL AFFAIRS, ARCTIC SLOPE REGIONAL CORPORATION

Ms. SWEENEY. Chairman Sullivan, good morning. I'm Tara Sweeney, Executive Vice President of External Affairs for Arctic Slope Regional Corporation or ASRC. ASRC is the Alaska Native Corporation created under the terms of the Alaska Native Claims Settlement Act of 1971.

Today I will highlight the main points of my written comments, which I have submitted to the Committee. Thank you for the opportunity to testify.

The proposed rule would designate riparian areas as jurisdictional waters subject to regulation by the Federal Government. The way the proposed rule defines "riparian areas" makes it applicable to virtually all wetlands in Alaska.

The size of the State of Texas is about 172 million acres. However, we have more wetlands in Alaska than the size of the entire State of Texas. According to Fish and Wildlife, Alaska is 403 million acres, with almost 174 million acres of wetlands, or 43.3 percent of Alaska's surface area compared to only 5.2 percent of wetland surface area in the Lower 48.

Their proposed rule creates the very real risk that any development, with at least 43 percent of Alaska, would immediately fall

within the Clean Water Act, Section 404 jurisdiction, for permits to dredge, and the Clean Water Act, Section 402 jurisdiction, for discharge pollutants.

Closer to home, the Arctic Foothills and the Coastal Plain are two areas that roughly correspond with the area and the jurisdiction of the North Slope Borough. Fish and Wildlife calculates that 46.9 million acres of these areas are wetlands. That's 83.1 percent of the lands that lie within the boundaries of the North Slope Borough. Only a small fraction of these are traditional navigable waters that would have been subject to regulation prior to the proposed rule.

There are over 2 million acres of lakes on the North Slope larger than 50 acres. There are another over 250,000 acres of rivers. Not all of these larger lakes and rivers are traditional navigable waters, but their total acreage, 2.7 million acres, represents the outside limit that would conceivably—that could conceivably be regarded as traditional navigable waters.

The proposed rule expands the area of the federally regulated waters within the North Slope from approximately 2.7 million acres to almost 47 million acres. This rule has the potential to multiply the area of federally regulated waters on the North Slope more than 1600 percent.

The scope of the rule on Alaska Natives: The U.S. Fish and Wildlife Study of Alaska Wetlands calculates that 19.6 million acres of the lands owned by Alaska Natives are wetlands, representing 44.5 percent of their ANCSA land entitlement, and are now at risk to become jurisdictional wetlands, which means that the burden on private landowners is severe. Those lands are privately owned by Alaska Natives who received them from the United States when the Federal Government abolished Alaska Native rights to claim land; and further mandated the use of those lands and other corporate assets to facilitate the self-determination, economic development and future prosperity of Alaska Native people.

This rule is in direct conflict with the congressional mandate handed down through ANCSA and threatens the viability of Alaska Native corporations to provide meaningful benefits to its members, its Alaska Native shareholders.

The proposed rule does not take into account Alaska's unique geography, and population into account. It creates no exception for any material portion of the wetlands in Alaska, yet, provides many exceptions for other uses, like agriculture. Alaskan waters are unusual in many respects, and that may make them unsuitable for this broad assertion of jurisdiction.

Many of Alaska's wetlands are frozen for 9 months out of the year and lie on top of a layer of permafrost. Unlike wetlands in temperate zones, Arctic wetlands, lying above thousands of feet of permafrost, are not connected to aquifers subject to waterflow. Because water on top of permafrost travels across the frozen tundra surface in sheet flow, these wetlands provide little function in controlling runoff. The proposed rule reflects no consideration for any of these unique aspects of Alaskan wetlands. Indeed, neither the word "tundra" nor the word "permafrost" appears anywhere in the 88 pages of the proposed rule.

The population of Alaska's remote regions is particularly dependent on resource development, which is jeopardized by the proposed rule. In our region the only durable economic development is resource development. No other use of land provides the necessary funding that translates into educational and employment opportunities, infrastructures such as sewer systems, fire and police protection. Shutting down development will breed a cycle of displacement, which is antithetical to the purpose of the Alaska Native Claims Settlement Act and to this administration's commitment to ensuring a bright future for Alaska Native youth.

In conclusion, ASRC believes that the proposed rule, in its current form, will impose enormous burdens on Alaska Natives, ASRC, our shareholders, and all residents of the North Slope, without any correlative benefit to the environment.

When the Federal Government proposes changes to established rules and regulations that it believes will help protect and conserve natural elements for the future enjoyment of all people, they, in fact, adversely affect the lives of those people who actually live in those areas and depend on those resources. This is particularly true in the North Slope region of Alaska, where a long history of subsistence overlaps with the legal imperative to allow development within the region for the benefit of our shareholders. Both elements define who we are as Inupiat people and are important to the long-term success of ASRC.

Further research and consideration may show that an exemption for permafrost is warranted. In addition, the Federal Government needs to provide additional clarification on the lands as to which areas within Alaska will be classified as jurisdictional waters. Regardless, because so many millions of acres of Alaska lands are potentially affected, the Agencies should specify how they intend to guarantee exemptions for private Alaska Native landowners, like Alaska Native corporations, and for the State of Alaska.

Thank you for the opportunity to provide comments.

[The prepared statement of Ms. Sweeney follows:]

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arctic slope regional corporation

Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water, and Wildlife Hearing
on the
U.S. Environmental Protection Agency and U.S. Army Corps of Engineers Proposed Rule Defining the Scope of Waters Protected under the Clean Water Act
April 6, 2015

Written Testimony
of
TARA M. SWEENEY, Executive Vice President of External Affairs
Arctic Slope Regional Corporation

Chairman Sullivan, Ranking Member Whitehouse, and distinguished members of the committee; on behalf of Arctic Slope Regional Corporation ("ASRC"), I am pleased to submit the following comments on the Environmental Protection Agency and U.S. Army Corps of Engineers (the "Agencies") proposed rule (the "Proposed Rule") defining the scope of waters protected under the Clean Water Act ("CWA").[1]

BACKGROUND

ASRC is the Alaska Native Corporation formed under the Alaska Native Claims Settlement Act of 1971 (ANCSA) for the area that encompasses the entire North Slope of Alaska. ASRC has a growing shareholder population of approximately 12,000, and represents eight villages on the North Slope: Point Hope; Point Lay; Wainwright; Atqasuk; Barrow; Nuiqsut; Kaktovik; and Anaktuvuk Pass.

ASRC is committed both to increasing the economic and shareholder development opportunities within our region, and to preserving the Iñupiat culture and traditions that strengthen both our shareholders and ASRC. Respect for the Iñupiat heritage is one of our founding principles. A portion of our revenues is invested into supporting initiatives that aim to promote healthy communities and sustainable economies.

ASRC owns approximately five million acres of land on Alaska's North Slope, conveyed to the corporation under ANCSA as a settlement of aboriginal land claims. Under the express terms of both ANCSA and the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), the unique character of these lands, founded in federal Indian law and the most significant Native claims settlement in U.S. history, must be recognized by

[1] Definition of "Waters of the United States" under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014) (hereinafter "Proposed Rule").

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the federal government in making any land management decisions. ASRC lands are located in areas that either have known resources or are highly prospective for oil, gas, coal, and minerals. ASRC remains committed to developing these resources and bringing them to market in a manner that respects Iñupiat subsistence values while ensuring proper care of the environment, habitat, and wildlife.

It is critical to ASRC and the broader Alaska Native community that the Federal government, specifically the Environmental Protection Agency, not take any action that, through the pursuit of this Proposed Rule, would have the effect of foreclosing the substantial economic opportunities associated with the potential for future responsible development of the North Slope's natural resources which can be found on Native-owned as well as State and Federal lands.

In addition, development activities compose a large portion of the region's tax base, empowering the North Slope Borough and other governmental entities to provide essential services to Alaska Natives and other residents, including housing, utilities, health care and education. Nearly all of the water, sewer, solid waste, and electrical utility services available across the North Slope are provided by the North Slope Borough. The North Slope Borough is also responsible for all road maintenance and construction across the region with the exception of private roads used for oil and gas development and state-maintained roads such as the Dalton Highway. It is essential that we retain the ability to use our natural resources in a respectful manner if we are to maintain our Iñupiat culture and traditions, as well the jobs and essential services that support our communities and residents.

INTRODUCTION

As set forth in greater detail below, ASRC believes that if the Proposed Rule regarding "Definition of 'Waters of the United States' Under the Clean Water Act" is adopted, not only will it hamper ASRC's use of its lands for the benefit of Alaska Natives, but it will also constrain the development of natural resources on Alaska's North Slope.

THE IMPACT OF THE PROPOSED RULE ON ALASKA

At 172 million acres, Texas is a very big state. However, its *total* acreage is still less than the number of acres of *wetlands* in Alaska. According to the U.S. Fish and Wildlife Service ("USFWS"), "Alaska encompasses an area of 403,247,700 acres, including offshore areas involved in this study. Total acreage of wetlands is 174,683,900 acres. This is 43.3 percent of Alaska's surface area. In the Lower 48 states, wetlands occupy only 5.2 percent of the surface area." [2] Put differently, nearly half of Alaska—the largest

[2] Jonathan V. Hall, W.E. Frayer and Bill O. Willen, Status of Alaska Wetlands at 3 (U.S. Fish and Wildlife Service 1994).

state in the United States, by a wide margin—stands to be affected by this Proposed Rule. Alaska has more wetlands than all of the other states combined.[3]

While USFWS uses an expansive definition of "wetlands" in its study, the jurisdictional waters categories added by the Agencies to the WOTUS definition in the Proposed Rule are at least as expansive. Compare, for example, the USFWS's definition of wetlands with the Agencies' definition of "riparian area":

Definition of wetlands used by USFWS in Status of Alaska Wetlands[4]	**Definition of "riparian area" proposed by the Agencies**[5]
"Technically, wetlands are *lands transitional between terrestrial and aquatic systems* where the water table is usually at or near the surface or the land is covered by shallow water. Wetlands must also have one or more of the following three attributes: 1) at least periodically, the land supports predominantly hydrophytes; 2) the substrate is predominantly undrained hydric soil; and 3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year."	"The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are *transitional areas between aquatic and terrestrial ecosystems* that influence the exchange of energy and materials between those ecosystems."

As noted above, under the Proposed Rule, "riparian areas" adjacent to traditionally navigable waterways are, by rule, jurisdictional waters.[6] As the Agencies make clear, once waters are jurisdictional "waters of the United States," there is no further argument or analysis:

> The agencies propose to define "waters of the United States" in section (a) of the Proposed Rule for all sections of the CWA to mean: Traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters, or the territorial seas; and adjacent waters, including adjacent

[3] *Id.*
[4] Status of Alaska Wetlands, at 11 (emphasis added).
[5] 79 Fed. Reg. at 22,271 (emphasis added).
[6] "Waters of the United States" include "adjacent" waters, which include "neighboring" waters, which include "riparian areas."

> wetlands. Waters in these categories would be jurisdictional 'waters of the United States' by rule—no additional analysis would be required.[7]

As such, the Agencies' proposed definition of "riparian area" creates the very real risk that, through the mere issuance of a final rule that includes such a "by-rule" designation of riparian areas, any development within more than 43% of Alaska – that is, Alaska's wetlands –would immediately fall within CWA §404 jurisdiction for permits to dredge and CWA §402 jurisdiction for discharge pollutants.[8] Even under their most aggressive rules, interpretations, policies and practices in the past, including those struck down in *SWANCC* and *Rapanos*, the Agencies have never before extended their reach to such extraordinary extents.

The risks are only somewhat reduced if the definition of "riparian area" is narrowed so that it does not include 43% of the state of Alaska. Any of the 174.7 million acres that might be excluded by a refinement of the "riparian area" definition would then be exposed to categorization as "other waters," requiring a case-by-case determination of whether they are within the WOTUS definition. The "other waters" classification included are "waters [that] alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to [jurisdictional waters]."[9] "Significant nexus" exists, according to the Proposed Rule, if

> a water, including wetlands, either alone or in combination with other similarly situated waters in the region . . . significantly affects the chemical, physical, or biological integrity of a [jurisdictional water]. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of [jurisdictional water].[10]

The vagueness in this significant nexus test is noteworthy. Waters are included if they "significantly affect" the chemical, physical, or biological "integrity" in a way that is not

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[7] 79 Fed. Reg. at 22,188-89.

[8] *See, e.g.*, 79 Fed. Reg. at 22,215-16 (noting that the list of proposed ecoregions for the analysis of "other waters" "does not include regions in Alaska or Hawaii . . . .") and at 22,231 (explaining that approximately "59% of streams across the United States (excluding Alaska) flow intermittently or ephemerally" but failing to explain why statistics excluding Alaska should be used to justify regulations that *will not* exclude Alaska).

[9] 79 Fed. Reg. at 22,271.

[10] 79 Fed. Reg. at 22,271.

"speculative or insubstantial" and if they perform "similar functions" and are located "sufficiently close together" as part of a single "landscape unit." Regulators and regulated parties who would have to apply these tests will understandably have difficulty finding certainty and predictability in this definition.

Unlike the many exceptions in the Proposed Rule created for agricultural (among other) uses,[11] the Proposed Rule creates no exception for any material portion of the wetlands in Alaska. Yet Alaskan waters are unusual in many respects that may make them unsuitable for this broad assertion of jurisdiction by the Agencies. Many of Alaska's wetlands are frozen for nine months out of the year and lie on top of a layer of permafrost. Their hydrologic functions are different from those in other parts of the country. The water table is also commonly situated on permafrost, resulting in saturated soils that support hybrid vegetation, but limiting connectivity to navigable waters. Unlike wetlands in temperate zones, Arctic wetlands, lying above of thousands of feet of frozen permafrost, are not connected to aquifers subject to water flow. Because water on top of permafrost travels across the frozen tundra surface in "sheet flow," these wetlands provide little function in controlling runoff.

The Proposed Rule reflects no consideration for *any* of these unique aspects of Alaskan wetlands. Indeed, neither the word "tundra" nor the word "permafrost" appears anywhere in the 88 pages of the Proposed Rule.

THE IMPACT OF THE PROPOSED RULE ON ALASKA NATIVES

Alaska is also unique because of the amount of land held by Alaska Natives, as a result of passage and implementation of the Alaska Native Claims Settlement Act of 1971. Unlike populations in the Lower 48, many Alaska Natives must utilize all of their resources to support themselves in the most remote and roadless regions in the United States, where basic necessities such as milk and fuel, cost significantly more than they do in the Lower 48. Public services taken for granted by most Americans are still not entirely available in rural Alaska. Subsistence hunting and fishing remain essential for many. Half of the calories consumed by Iñupiat on the North Slope come from our own hunting, fishing and whaling.[12]

ANCSA extinguished all aboriginal title claims in Alaska in exchange for a cash payment and the granting of Native selection rights to 44 million acres of Federal properties. Though 44 million is a large number, it is important to note that ANCSA granted Alaska Natives only a small fraction of the land we have used and lived on in Alaska for thousands of years. Despite the fact that 92% of Alaska had historically been used by Alaska Natives, ANCSA extinguished our aboriginal claims to that land, and granted us approximately 12% of the State's land area, mostly from the portion that had not already been appropriated by the State or Federal government.

[11] 79 Fed. Reg. at 22,264.

[12] Alaska Department of Fish and Game, Division of Subsistence.

The USFWS's Study of Alaska Wetlands calculates that 19.575 million acres of the lands owned by Alaska Natives are wetlands, representing 44.5% of their ANCSA land entitlement.[13] As with Alaskan waters generally, Alaska Natives are now at risk that *all* of these nearly 20 million acres will become jurisdictional wetlands because they are riparian areas, or "other waters" if they somehow significantly affect jurisdictional waters.[14] Though these wetlands are a subset of the 174 million acres of wetlands in Alaska, they deserve special consideration for two reasons. First, they are entirely privately owned, which means that the burden on private land rights is severe. Second, they are owned by Alaska Natives who received them *from the United States government* with the intention of facilitating the economic development, self-sufficiency, self-determination and future prosperity of the Alaska Native people. Yet the Agencies, themselves part of that United States government, now propose a rule that suffocates the potential of those assets.

Congress intended the land grant in ANCSA to provide for economic development for the benefit of all Alaska Natives. The House Report made this intention clear:

> When determining the amount of land to be granted to the Natives, the Committee took into consideration . . . the land needed by the Natives *as a form of capital for economic development.*[15]

Moreover, Congress' "economic development" intent expressly included mineral development. The Committee Report stated that the Regional Corporations will:

> each share equally in the mineral developments. The mineral deposits . . . [are] included as part of the total economic settlement. We feel it is very important for these mineral deposits to be available to all of the natives to further their economic future.[16]

In *City of Angoon v. Marsh*,[17] the Ninth Circuit addressed the conflict between resource development on ANCSA and ANILCA[18] lands and land use restrictions that would

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[13] Study of Alaska Wetlands, Table 1.

[14] ASRC does not dispute that some portion of these wetlands may fall under the jurisdiction of the Agencies regardless of the Proposed Rule.

[15] H.R. Rep. 92-523 at 5 (September 28, 1971); 1971 U.S.C.C.A.N. 2192, 2195 (emphasis added).

[16] *Id.*

[17] 749 F.2d 1413 (9th Cir. 1984), *later proceedings at Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986), *cert. denied, Angoon v. Hodel*, 484 U.S. 870 (1987).

prohibit such resource development (in that case, federal designation of a national monument including the lands at issue and a federal statutory prohibition on the sale or harvest of timber "within the monument"). Noting that the land conveyance to the Alaska Native Village Corporation of Shee Atiká, Incorporated was for the "economic and social needs of the Natives,"[19] the court stated that "it is inconceivable that Congress would have extinguished their aboriginal claims and insured their economic well being by forbidding the only real economic use of the lands so conveyed."[20] The Ninth Circuit Court of Appeals further concluded that the District Court's contrary interpretation of legislation "would defeat the very purpose of the conveyance to Shee Atiká . . . ."[21]

In *Koniag, Inc. v. Koncor Forest Resource Management Co.*,[22] the Ninth Circuit reaffirmed congressional intent for to resource development by Native Corporations. Quoting the House Report cited above, the Ninth Circuit stated:

> ANCSA's legislative history makes clear that Congress contemplated that land granted under ANCSA would be put primarily to three uses – village expansion, subsistence, and capital for economic development. *See* H.R. Rep. 92-523 at 5, 1971 U.S.C.C.A.N. at 2195. *Of these potential uses, Congress clearly expected economic development would be the most significant*:
>
> > The 40,000,000 acres is a generous grant by almost any standard. . . . The acreage occupied by the Villages and needed for normal village expansion is less than 1,000,000 acres. While some of the remaining 39,000,000 acres may be selected by the Natives because of its subsistence use, most of it will be selected for its economic potential.[23]

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[18] The Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 410hh - 410hh-5, 460mm - 460mm-4, 539-539e and 3101-3233, also 43 U.S.C. §§ 1631-1642; December 2, 1980, as amended.

[19] The Congressional findings included in ANCSA, 43 USC § 1601(b) state:

> [T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property....

[20] *Id.*

[21] *Id.* at 1418. These issues appeared again in *City of Angoon v. Hodel*. The Ninth Circuit affirmed its decision in *City of Angoon v. Marsh* that Congress would not intend to take away the economic use of property conveyed under ANCSA and ANILCA.

[22] 39 F.3d 991 (9th Cir. 1994).

[23] *Id.* (emphasis added). *See also Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 731 (9th Cir. 1978).

In short, Congress's stated purpose of granting lands to Alaska Natives (to develop their own economic well-being on our own lands) will be substantially and unfairly eroded if the Proposed Rule is allowed to go into effect in its present form.

THE IMPACT OF THE PROPOSED RULE ON ALASKA'S NORTH SLOPE

The Proposed Rule creates many problems for Alaska Natives throughout the State of Alaska; however, the problems are especially harsh on Alaska's North Slope. The USFWS calculates that 46.9 million acres in the Arctic Foothills and Coastal Plain are wetlands. Together these areas correspond roughly with the borders of the North Slope Borough. This is 83.1% of the total acreage (56.4 million acres) of those two areas.[24] In other words, more than four-fifths of the entire North Slope Borough is potentially affected by the Proposed Rule.

While 47 million acres on the North Slope are wetlands according to the USFWS, only a small fraction of these are "traditional navigable waters." The North Slope has 23,300 lakes, from a few yards to over 20 miles and seldom deeper than 10 feet.[25] There are 2,450,858.5 acres of lakes on the North Slope larger than 50 acres.[26] There are another 260,629 acres of rivers.[27] Not all of these larger lakes and rivers are "traditional navigable waters," but their total acreage—2.7 million acres—represents the outside limit of what conceivably could be regarded as "traditional navigable waters."

This high-end estimate of "traditional navigable waters" is less than 6% of the total wetlands identified by the USFWS. The possibility that the Proposed Rule will expand USFWS's jurisdiction from these 2.7 million acres of "traditional navigable waters" to *47 million* acres of jurisdictional or "other" waters is a demonstration of the massive overreach represented by the Proposed Rule. Put differently, the Proposed Rule has the potential to multiply the area of federally regulated "waters" by *more than sixteen hundred percent* (1600%)!

These facts raise the following questions:

- Are all of the 56.4 million acres of wetlands on the North Slope jurisdictional waters because they are "traditional navigable waters" or riparian areas that are "adjacent" to "traditional navigable waters"?

[24] Status of Alaska Wetlands, at 20.
[25] "Digital Data Base of Lakes on the North Slope, Alaska," U.S. Geological Survey Water-Resources Investigations Report 86-4143 (1986).
[26] Estimated by Marie Walker, a remote sensing consultant and principal author of the USGS Water Resources Division report cited above.
[27] Estimated by the Arctic Slope Consulting Group based on Landsat image maps.

- If not, what are the clear demarcations in the Proposed Rule that relieve these lands of that regulatory burden and that will prevent Agency officials from misconstruing the Proposed Rule?

- How will landowners know which wetlands are jurisdictional waters, given the ambiguities in the Proposed Rule?

- For those wetlands that are not jurisdictional waters, are they "other waters" because they are within a "single landscape" and are or may "opportunistically" be visited by migratory birds or insects? The North Slope—although it is larger than the State of Utah—is largely a single unified, relief-free geographic area. Does that make it a "single landscape"? If not, what are the clear demarcations in the Proposed Rule that relieve these lands of that regulatory burden and that will prevent Agency officials from misconstruing the Proposed Rule?

- How is it possible to plan development for the economic betterment of the people living on the North Slope, the majority of whom are Alaska Natives and ASRC shareholders, in the face of these uncertainties?

THE IMPACT OF THE PROPOSED RULE ON ASRC

ASRC's Iñupiat shareholders are the majority population on the North Slope and live in eight remote villages, none of which is on a power grid or road system that reaches beyond the village.

ASRC owns approximately five million acres of land on the North Slope with the same pattern of wetlands that exist generally across the North Slope, as described above. ASRC selected these lands for their high potential for oil, gas, coal and mineral resources. ASRC, as a steward of the land, continuously strives to balance management of cultural resources with management of natural resources.

Economic development growth opportunities on the North Slope are limited. With expensive energy dependent largely on diesel fuel at a delivered cost of more than $7 per gallon, transportation that is limited to aircraft and seasonal barge deliveries, a harsh climate with average low temperatures of minus 20 degrees in the winter, and a small and widely dispersed labor force, the increased regulatory burdens on landowners caused by the Proposed Rule will only act as a hindrance to the economic prosperity of the region. Our economic health of our region and the viability of our communities are dependent upon the responsible development of our natural resources.

The regulatory burdens imposed on our region by the Proposed Rule will directly, immediately and adversely affect the economic well-being of literally thousands of people who uniquely rely on the land and its resource potential for their survival. Although that alone is reason enough to reject the Proposed Rule, it is important to note

that the Proposed Rule is also in direct opposition to the statutory mandate placed on ASRC by Congress through the passage of ANCSA. The Proposed Rule, as written, would essentially prohibit ASRC from developing our lands to provide benefits to our shareholders. In summary, the Proposed Rule will have disproportionate consequences for the Alaska Native people who call the North Slope home.

CONCLUSION

Our communities and shareholders appreciate our longstanding relationship with the federal government. However, in many cases, when the federal government proposes changes to established rules and regulations that it believes will help protect and conserve natural elements for the future enjoyment of *all* people, they in fact adversely affect the lives of those people who actually live in those areas, and depend on those resources. This is particularly true in the North Slope region of Alaska, where a long history of subsistence overlaps with a legal imperative to allow development within the region for the benefit of our shareholders. Both elements define who we are as Iñupiat people and are important to the long-term success of ASRC.

ASRC believes the EPA needs to consider, and acquire a better understanding of, the impacts the Proposed Rule will have on Alaska, and specifically the North Slope.

ASRC believes that the Proposed Rule, in its current form, will impose enormous burdens, not only on ASRC and our shareholders, but also on all of the residents of the North Slope—without any correlative benefit to the environment. ASRC believes that the Proposed Rule does expand the jurisdiction of the federal government, specifically the EPA and the U.S. Army Corps of Engineers. At a minimum, the federal government needs to explicitly exclude wetlands that lie atop permafrost. Further research and consideration may show that an exemption for permafrost areas is warranted. In addition, the federal government needs to provide additional clarification on the lands as to which areas within Alaska will be classified as jurisdictional waters. Regardless, because so many millions of acres of Alaska lands are potentially affected, the Agencies should specify how they intend to guarantee exemptions for private Alaska Native landowners like Alaska Native Corporations and for the State of Alaska.

Thank you for the opportunity to provide comments on this topic of significant importance.

Senator SULLIVAN. Thank you very much, Ms. Sweeney. That was very powerful testimony. Particularly the conflict with ANCSA, that's something I'd like to explore in some of the Q&A, if we have the time.

Thank you very much.

Our next witness will be Kara Moriarty, President/CEO of the Alaska Oil and Gas Association.

STATEMENT OF KARA MORIARTY, PRESIDENT/CEO, ALASKA OIL AND GAS ASSOCIATION

Ms. MORIARTY. Good morning. My name is Kara Moriarty, and I serve as President and CEO of the Alaska Oil and Gas Association, commonly referred to as AOGA. We are the professional trade association for the industry here in Alaska.

Thank you for the opportunity, Senator, to testify and explain what we view are the negative consequences that will inevitably follow if the proposed rule continues down this path.

As context for my testimony, Alaska has 63 percent of the Nation's jurisdictional waters and represents 20 percent of the U.S. landmass. I cannot emphasize enough that Federal rules of the nature proposed by EPA in this instance have a huge and disproportionate impact on the Alaskan public, private and Native interests, yet, EPA has given no attention and attributed no significance of which I'm aware to the unique and profound significance of changes in the Clean Water Act jurisdiction proposed here in Alaska.

The rule would serve to dramatically, and we believe illegally, expand the Clean Water Act jurisdiction here in the State. Enacted in 1972, the Clean Water Act endeavored to create a workable partnership between the States and Federal agencies to effectively manage identified pollution sources. The proposed rule represents an unfortunate revision to an agreement Alaskans have long honored.

The EPA has repeatedly suggested that the rule is intended to simply provide "clarity" and reduce "uncertainty." However, the rule has had just the opposite effect, causing members of the regulated community, and others, to have great and grave concerns. We believe this rule will result in significant regulatory burdens by causing water features, such as canals and ditches with only remote and speculative hydrological connections to traditionally navigable and interstate waters, to become "jurisdictional" under the Clean Water Act for the first time.

Despite the EPA's statements to the contrary, the EPA—the rule will allow the EPA to exercise authority under the act potentially on virtually any water feature with any tentative or hypothetical connection, directly or indirectly, to a traditionally navigable or interstate water.

Despite the guidance of the Supreme Court that has said, time and time again, that there are limits to Federal jurisdiction under the Clean Water Act, the proposed rule will extend coverage to many features that are remote and/or carry only minor volumes. The proposed rule, read together, serve to provide no meaningful limit to Federal jurisdiction. Understandably, all Alaskans should be concerned that the EPA's proposed rule would allow it to regu-

late far more bodies of waters than it attempted to regulate prior to being rebuked by successive Supreme Court decisions.

Moving past the issues of legality, another primary concern remains that the proposed rule will expand regulatory gridlock and uncertainty by subjecting even more activities to permitting requirements, NEPA analysis, mitigation requirements, and citizen lawsuits challenging the applications of new terms and provisions. Naturally, these impacts will be felt by the entire regulated community, and will result in an exponential increase in the costs of projects large and small.

Nevertheless, the EPA has largely ignored the potential adverse effect on economic activity and job creation, by relying on its highly flawed economic analysis for the proposed rule. Based on the EPA's calculations, the total estimated cost ranges from $133 million to $230 million, when, in reality, private and public sectors spend approximately $1.7 billion a year today to obtain Section 404 permits. It takes over 2 years to obtain a 404 permit. It is impossible to understate how significantly the proposed rule will affect operations in Alaska, through both increased delay and increased costs.

So, finally, despite the obvious disproportionate and adverse effects in Alaska of a dramatic expansion of Clean Water Act regulation, the EPA has failed to include adequate analysis of how the proposed rule will affect Alaska. The EPA should be mandated to consider Alaska's unique circumstances.

So, Senator, I encourage the committee to consider the profound impacts this rule will have on Alaska and its citizens. It is an ill-conceived rule that serves only to frustrate State sovereignty and local regulations.

Thank you.

[The prepared statement of Ms. Moriarty follows:]

Alaska Oil and Gas Association

AOGA

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Email: moriarty@aoga.org
Kara Moriarty, President & CEO

April 3, 2015

Senator Dan Sullivan
510 L Street, Suite 750
Anchorage, Alaska 99501
Submitted electronically to:
erik_elam@sullivan.senate.gov
laura_atcheson@epw.senate.gov

Subject: Impacts of the Proposed Waters of the United States Rule on State and Local Governments and Stakeholders

Good morning, my name is Kara Moriarty and I serve as the President and CEO of the Alaska Oil and Gas Association (AOGA). AOGA is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefit of all Alaskans. AOGA's membership includes 14 companies representing the industry in Alaska, which have state and federal interests, both onshore and offshore. I greatly appreciate the opportunity to discuss the proposed Waters of the United States Rule and the negative consequences that will inevitably follow if the EPA continues down this path.

As context for my testimony, Alaska has 63% of the nation's jurisdictional waters and represents 20% of the U.S. land mass. I cannot emphasize enough that federal rules of the nature proposed by EPA in this instance have a huge and disproportionate impact on Alaskan public, private and native interests. Yet EPA has given no attention and attributed no significance of which I am aware to the unique and profound significance of changes in Clean Water Act jurisdiction in Alaska.

The proposed rule would serve to dramatically, and we believe illegally, expand Clean Water Act jurisdiction in Alaska. Enacted in 1972, the Clean Water Act endeavored to create a workable partnership between the states and federal agencies to effectively manage identified pollution sources. The proposed rule represents an unfortunate revision to an

agreement Alaskans have long honored. The EPA has repeatedly suggested that the Rule is intended to simply provide "clarity" and reduce "uncertainty." However, as outlined in my testimony, the rule has had the opposite effect, causing members of the regulated community, ranging from municipalities and boroughs to the agricultural, mining, and oil and gas industries, to have great and grave concerns that this rule will result in significant regulatory burdens by causing water features, such as canals and ditches with only remote and speculative hydrological connections to traditionally navigable and interstate waters, to become "jurisdictional" under the Clean Water Act for the first time. Despite the EPA's statements to the contrary, I hope that each and every member of the regulated community appreciates that the rule represents a statement by the EPA that it intends to exercise authority under the Clean Water Act on virtually any water feature with any tentative or hypothetical connection, directly or indirectly, to a traditionally navigable or interstate water.

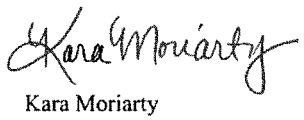
The Supreme Court of the United States has, time and again, clearly held that there are limits to federal jurisdiction under the Clean Water Act, ardently rejecting the notion than any remote hydrological connection effectively trumps state jurisdiction. The Court has repeatedly emphasized the need for the EPA to establish that a body of water constitutes a "navigable waterway," as defined under the Clean Water Act, to effectively trigger federal jurisdiction. Despite that guidance, the proposed rule will extend coverage to many features that are remote and/or carry only minor volumes, including dry streambeds that only occasionally fill with water and small ponds and water holes. The proposed rule provisions read together serve to provide no meaningful limit to federal jurisdiction. Understandably, all Alaskans should be concerned that the EPA's proposed rule would allow it to regulate far more bodies of water than it attempted to regulate prior to being rebuked by successive Supreme Court decisions. I also am concerned how the EPA could, in good faith, construe Supreme Court decisions reigning in federal overreach as inviting a dramatic and unprecedented expansion of EPA authority.

Moving past issues of legality, my primary concern remains that the proposed rule will expand regulatory gridlock and uncertainty by subjecting even more activities to CWA permitting requirements, NEPA analyses, mitigation requirements, and citizen lawsuits challenging the applications of new terms and provisions. Naturally, these impacts will be felt by the entire regulated community, and will result in an exponential increase in the costs of projects large and small. Nevertheless, the EPA has largely ignored the potential adverse effect on economic activity and job creation, by relying on its highly flawed economic analysis for the proposed rule. Based on the EPA's calculations, the total estimated cost of the proposed action ranges from $133.7 million to $231 million. However, according to Dr. David Sunding, a professor of agricultural and resource economics at the University of California, Berkeley, the EPA's "entire analysis is fraught with uncertainty" and is not an accurate evaluation of the actual cost of implementing the rule. Furthermore, Dr. Sunding stated that "the errors, omissions, and lack of transparency

in [the] EPA's study are so severe [that it renders it] virtually meaningless." In reality, private and public sectors spend approximately $1.7 billion a year to obtain Section 404 permits. It takes over two years to obtain a 404 permit, with an average cost of almost $300,000. It is impossible to understate how significantly the proposed rule will effect operations in Alaska, through both increased delays and increased costs.

Finally, returning to my original point, despite the obvious disproportionate and adverse effects in Alaska of a dramatic expansion of Clean Water Act regulation, the EPA has failed to include adequate analysis of how the proposed rule will affect Alaska. The EPA should be mandated to consider Alaska's unique circumstances, such as the fact that less than one percent of Alaska is held in conventional private ownership and that federal agencies currently claim ownership and jurisdiction of 222 million acres of Alaska, or 61 percent of the state. I encourage this Committee to consider the profound and adverse impacts this rule will have on Alaska and its citizens. It is an ill-conceived rule that serves only to frustrate state sovereignty and local regulations.

Sincerely,



Kara Moriarty
President and CEO
Alaska Oil & Gas Association

Senator SULLIVAN. Thank you, Ms. Moriarty. And thank you, again: Powerful testimony, particularly with regard to the issue of costs, which I think, again, we should explore a little bit more in the Q&A session.

Our next witness is Rick Rogers, Executive Director of the Resource Development Council for Alaska.

STATEMENT OF RICK ROGERS, EXECUTIVE DIRECTOR, RESOURCE DEVELOPMENT COUNCIL FOR ALASKA

Mr. ROGERS. Good morning, Senator. Welcome back home.

For the record, my name is Rick Rogers. I'm Executive Director of the Resource Development Council for Alaska. RDC is a membership-funded statewide trade association. We represent oil and gas, mining, fishery, tourism, and forest industries. Our membership is really a broad cross section of Alaska businesses and organizations. We include all 12 Alaska regional Native corporations, organized labor, utilities, communities, and we all share the common vision that resource development is vital to the well-being for Alaskans and that responsible resource development is essential for our well-being.

The EPA's proposed "Waters of the U.S." rule will have a disproportionate impact on the resource-dependent industries and on Alaska's economy as a whole. It's appropriate that this field hearing is being held in Alaska, because as other folks have already stated, according to the U.S. Fish and Wildlife Service, Alaska has 63 percent of the Nation's wetland ecosystems, and estimates place the total acreage at approximately 130 million acres.

The rule will have a disproportionate impact on Alaska. Before commenting on the specific problems we see with the proposed rule, it's important to underscore how classification of a wetland as jurisdictional or "waters of the U.S." impacts community and resource development projects in Alaska.

The Federal Government already enjoys a disproportionate jurisdiction over land use and economic development in our State. Approximately 222 million acres, or about 61 percent of Alaska, is already under direct jurisdiction by the Federal Government. Much of this is in conservation system units and other land designations that are closed to development. So Section 404 of the Clean Water Act expands that Federal reach to private, Alaska Native corporation, State and municipal lands if wetlands are determined to be jurisdictional and 404 permits are required.

So, if you look at the cumulative impact of both the vast Federal lands, the fact that we have ubiquitous wetlands in our State, and an ever-expanding definition of which of those wetlands fall under Federal jurisdiction, it means that few projects in Alaska are outside the reach of Federal oversight.

The rule fails to meet the EPA's stated objectives. We are in agreement with the EPA in its stated intent that the rule should remove uncertainty and confusion in determining what lands and activities require Section 404 permits. However, rather than reducing confusion, the proposed rule, as written, takes a very aggressive and broad interpretation of Federal jurisdiction, rendering adjacent waters, floodplains, ephemeral streams, tributaries, and ditches with limited exceptions as jurisdictional.

Perhaps the EPA's vision of "clarity" simply means defaulting on the side of Federal jurisdiction and broadening the definitions of existing regulatory categories of tributaries and regulating new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains and other waters.

The EPA's assurances fall flat upon a plain reading of the rule. The EPA has lost an aggressive public relations campaign in an effort to refute the concerns of RDC and other concerned members of the public who have concluded, through a plain reading of the rule, that it materially expands the scope and reach of the Clean Water Act. The EPA's assurances don't match with the plain language in the rule.

The "tributaries," the newly defined term, automatically jurisdictional. Adjacent wetlands are considered jurisdictional, the legal test of nexus having all but been assumed. Many "other waters" are likely to be jurisdictional under the rule. Even ditches. And one thing that really concerns us is this concept of "inside the fence," or a ditch within a project that's already been developed could be considered jurisdictional, even after you get your permits.

And finally, we think the EPA grossly underestimates the costs of the rule. The EPA estimates that the rule will increase jurisdictional wetlands by about 3 percent. We think this is a gross understatement. The Waters Advocacy Coalition refutes the EPA's methodology as grossly understating this effect, both because of flawed methodology as well as they failed to consider the impacts of much of the new jurisdictional technology: "neighboring," "adjacent," "tributary," "riparian areas," and "floodplain."

So, even assuming the EPA's conservative estimate is correct, it would still increase jurisdictional wetlands in Alaska by 3.6 million acres, if you just take the 3 percent and apply it to the 130 million. And of course, that—I do note your colleague, Senator Whitehouse isn't here today, but that would be five times of his home State of Rhode Island.

Senator SULLIVAN. I'll make sure he's aware of that when I go back and forth.

Mr. ROGERS. So we applaud the congressional oversight on this issue, Senator Sullivan, and as currently drafted we're concerned the rule will have significant negative impacts on Alaskans. And we really thank you for the opportunity to comment on this very important initiative.

Thank you.

[The prepared statement of Mr. Rogers follows:]

Statement of Rick Rogers
Executive Director
Resource Development Council for Alaska
121 W. Fireweed Lane, Suite 250
Anchorage, AK 99503

before the
Subcommittee on Fisheries, Water and Wildlife
Committee on Environment and Public Works
United States Senate

regarding
Impacts of the Proposed Waters of the United States Rule
on State and Local Governments and Stakeholders

April 6, 2015
10:00 AM
Loussac Library Assembly Chambers
3600 Denali Street
Anchorage, AK 99503

Rick Rogers
Executive Director
Resource Development Council for Alaska

Testimony on the Impacts of the Proposed Waters of the United States Rule on State and Local Governments and Stakeholders
Before Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water and Wildlife
April 6, 2015

Good morning members of the committee. My name is Rick Rogers, Executive Director of the Resource Development Council for Alaska (RDC). RDC is a statewide membership-funded non-profit trade association representing the common interest of the Forestry, Fishing, Tourism, Mining and Oil and Gas industries in Alaska. Our membership is truly a broad cross section of Alaska businesses including the aforementioned industries as well as communities, all twelve Alaska Native Regional Corporations, organized labor, utilities and support business that recognize the important role resource development plays in our economy. I have submitted a copy of our most recent annual report for the record.

The Environmental Protection Agency's (EPA) proposed Waters of the U.S. rule (WOTUS) will have a disproportionate impact on Alaska's resource dependent industries and our economy as a whole. It is appropriate the committee chose to hold a field hearing here in Alaska. According to the U.S. Fish and Wildlife Service (USFWS), the State of Alaska includes approximately 63 percent of the nation's wetland ecosystems. Estimates place the total acreage at approximately 130 million acres or about one-third of the State.

The Rule has a Disproportionate Impact on Alaska

Before commenting on specific problems we see in the proposed rule, it is important to underscore how a classification of a wetland as a jurisdictional "Water of the U.S." impacts community and resource development projects in Alaska. The federal government already enjoys a disproportionate jurisdiction over land use and economic development in our state. Approximately 222 million acres, approximately 61 percent of Alaska is under direct federal jurisdiction, much of which is in conservation system units that are off limits to any type of development. Section 404 of the Clean Water Act expands that federal reach to private, Alaska Native Corporation, State, and municipal lands where wetlands are determined to be jurisdictional and therefore section 404 permits are required. The cumulative impact of vast federal lands, ubiquitous wetlands, and an ever-expanding definition of which Alaska's wetlands fall under federal regulatory jurisdiction means few projects in Alaska are outside the reach of federal oversight.

The Rule Fails to Achieve the EPA's Stated Objectives

We are in agreement with the EPA's stated intent for the rule to remove uncertainty and confusion in determining what lands and activities require Section 404 permits. However, rather than reducing confusion, the proposed rule as written takes the most aggressive and broad interpretation of federal jurisdiction, rendering adjacent waters, floodplains, ephemeral streams, tributaries, and ditches with limited exceptions as jurisdictional.

Perhaps the EPA's version of "clarity" simply means defaulting on the side of federal jurisdiction and broadening definitions of existing regulatory categories (tributaries) and regulating new areas that are not jurisdictional under current regulations (adjacent non wetlands, riparian areas, floodplains and other waters).

The EPA's Assurances Fall Flat Upon Plain Reading of the Rule

The EPA has launched a public relations campaign in an attempt to refute the concerns of RDC and other concerned members of the public who have concluded through a plain reading of the rule that it materially expands the scope and reach of the Clean Water Act. The EPA's assurances don't match the plain language of the rule.

Tributaries are a new and defined term and automatically jurisdictional under the rule. Adjacent Waters are considered jurisdictional, the legal test of significant nexus having been assumed. Many "other waters" will likely be deemed jurisdictional under the rule. As drafted, even ditches "inside the fence" or within the confines of developed projects could be deemed jurisdictional.

The EPA Grossly Underestimates the Costs of the Rule

The EPA estimates an increase of three percent in jurisdictional wetlands under the rule. This is a gross understatement. The Waters Advocacy Coalition[1] refutes the EPA's methodology as grossly understating this effect, both because of flawed methodology and because EPA failed to consider the impacts of new jurisdictional terminology such as neighboring, adjacent, tributary, riparian areas, and floodplain. Even assuming the EPA's conservative estimate is correct, the rule increases jurisdictional wetlands in Alaska by 3.6 million acres (three percent of 130 million acres of wetlands), about five times the size of Senator Whitehouse's home state of Rhode Island.

RDC applauds your congressional oversight on this issue. As currently drafted the rule will have significant negative impact on Alaskans. Thank you for the opportunity to comment on this far-reaching initiative. I have included additional references, and prior RDC comments to EPA on this rule and background for the record.

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1. *Review of 2013 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States*, Sunding, David, Ph.D., February, 2014

Additional Background to Augment RDC verbal testimony.

Natural Resources are vital to the economic survival of Alaska and its residents. In part, Alaska was granted statehood due to our vast natural resources; the federal government expected Alaska to utilize its bounty of natural resources to build and sustain its economy. Alaska's constitution includes a unique provision, title 8, the preamble of which states "It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." To fulfill the vision of Alaska's constitution, we must have access to our resources, and avoid uncertainty and unnecessary regulations that offer no added benefit to the environment.

Our members know that Alaska's economy is based on responsible resource development conducted in accordance with existing local, state, and federal environmental protections and laws. Alaskans must continue to have access to our valuable and traditional resources. The responsible development of these resources creates jobs in communities throughout Alaska, many of which have few other jobs available. Many of these communities will disappear if overly burdensome and unnecessary regulations are added to existing and new projects.

Attachments submitted for the record include:

RDC written comments regarding the WOTUS proposed rule and related connectivity report dated 7/29/11, 11/6/13, 7/7/14, and 11/14/14.

Growing Alaska through responsible resource development, 2014 Annual Report of the Resource Development Council for Alaska. Available online at http://akrdc.org/membership/annualreport/annualreport2014.pdf

Who Owns Alaska, A Special Issue of Resource Review, A periodic publication of the Resource Development Council for Alaska. Available online at http://akrdc.org/newsletters/2009/whoownsalaska.pdf

Review of 2013 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States, Sunding, David, Ph.D., February, 2014 http://www.nssga.org/wp-content/uploads/2014/05/WOTUS-Economic-Report-FINAL.pdf

Senator SULLIVAN. Thank you, Mr. Rogers. I appreciate the testimony.

Rod Hanson, Vice President of Alyeska Pipeline Service Company, will be our next witness.

Mr. Hanson.

STATEMENT OF ROD HANSON, VICE PRESIDENT, ALYESKA PIPELINE SERVICE COMPANY

Mr. HANSON. Senator Sullivan, thank you for the opportunity to appear here today and discuss the proposed rule regarding "Waters of the U.S." and its possible impact on Alyeska Pipeline Service Company. My full statement has been submitted in writing, and so I'm offering an abbreviated version for you here this morning.

Senator SULLIVAN. Thank you.

Mr. HANSON. My name is Rod Hanson. I'm Vice President for System Integrity, Engineering and Projects with Alyeska. I joined Alyeska in 1991 as a civil and structural engineer, and I've had a variety of roles with the company over the years, including Terminal Manager, Pipeline Manager. I headed up our commercial and supply chain group for a while, and also our HSE, health, safety and environment group.

I'm proud to work for an Alaska company. I came to Alaska in 1978. My wife was born and raised here. We've raised our kids here, our kids are now raising their kids here, and so it's great to be here speaking not only as an employee of Alyeska but as an Alaskan today.

I'm here representing 1,600 employees and contractors who operate and maintain TAPS, the 800-mile Trans-Alaska Pipeline System, and our job is transporting crude oil from the North Slope to Valdez, where it's then put on tankers and sent south to the Lower 48, to the West Coast. Since startup in 1977, we've moved over 17 billion barrels of crude oil, and at peak production, we were moving 2.1 million barrels a day. However, that production has been declining steadily over the years, and we are currently transporting just over 500,000 barrels per day.

This lower throughput creates serious operational challenges for us. The oil takes much longer to get to Valdez, and it loses heat rapidly. Colder crude oil creates wax and ice and allows that opportunity for wax and ice to buildup in the system and interfere with our operations.

While we're confident of our abilities and our resources to meet these challenges, we know that they will continue to grow as throughput declines. We're committed to protecting the environment that we operate in here in Alaska, and to this end we fully support appropriate regulatory efforts to protect our Nation's waters.

There are 21 different Federal and State agencies that oversee our work. We work hard to ensure that we comply with all regulations; we obtain all required permits and authorizations, and we keep our regulators very well informed of our activity. Occasionally, though, a new regulation is proposed which does not seem to consider the Arctic environment here in Alaska or the practical complexities of operating an 800-mile pipeline through this environment. That is the case here with the proposed rule, on the "Waters

of the U.S." We believe this rule will significantly increase how much of our work is regulated under the Clean Water Act.

Many of the discharges associated with our operations consist of water removed from construction project sites and drainage from precipitation events which do not reach waters of the U.S. The expansive definition of "waters of the U.S." could really make these discharges jurisdictional and subject to the Clean Water Act permitting and regulatory requirements. This could significantly delay our ability to get critical work done, in what is a short Alaska construction and maintenance season.

As we review the proposed rule, we've identified numerous potential impacts to TAPS. These include, first, unique features common in Alaska, such as permafrost, wet tundra, muskegs and bogs, may end up being considered jurisdictional waters, or they may result in the designation of "other waters" as jurisdictional. Any TAPS discharges to upland, dry, and isolated areas that are hydrologically connected to or even in the vicinity of those geographical or water features may become subject to Clean Water Act requirements.

Second, discharges to dry stream channels, tundra and upland areas could now be considered discharges to jurisdictional waters and subject to new permitting and treatment requirements.

Third, manmade structures, ditches, effluent channels and storage pits may themselves become jurisdictional under the proposal, and if these engineered structures were to be considered jurisdictional waters, we may be required to manage the water quality even within those structures and features.

Fourth, these same concerns arise even with naturally occurring stormwater features, such as roadside ditches and other natural drainages on or adjacent to TAPS property.

Even gravel pits could be subject to Clean Water Act requirements, since manmade ponds, lagoons or other water storage areas could be considered jurisdictional.

These are just a few of the ways we believe the proposed rule could impact our management of TAPS. We're hopeful that the proposal will be withdrawn, or dramatically changed, so that these impacts are not added to our current challenges.

Safety and integrity of the pipeline are paramount, core values here at Alyeska, and I'm proud to report that we currently have the best safety record we've had in our entire history. We've been named as one of the World's Most Ethical Companies by the Ethisphere Institute now for 4 years in a row. Our Vessel of Opportunity Program received a 2015 Alaska Ocean Leadership Award for stewardship and sustainability from the Alaska SeaLife Center.

A couple weeks ago, we received a Governor's Safety Award. And, over the years, we've been honored many times with both the American Petroleum Institute's Distinguished Operator Award and Environmental Performance Award. Our record for protecting the environment has and will continue to be one of the best in our industry or any industry in Alaska.

And, Senator, I appreciate the opportunity to testify here today.

[The prepared statement of Mr. Hanson follows:]

Statement of Rod Hanson
Vice President, System Integrity, Engineering & Projects
Alyeska Pipeline Service Company
P.O. Box 196660
Anchorage, AK 99519-6660

before the
Subcommittee on Fisheries, Water and Wildlife
Committee on Environment and Public Works
United States Senate

regarding
Impacts of the Proposed Waters of the United States Rule
on State and Local Governments and Stakeholders

April 6, 2015
10:00 a.m.
Loussac Library Assembly Chambers
3600 Denali Street
Anchorage, AK 99503

Statement of Rod Hanson
Vice President, System Integrity, Engineering & Projects
Alyeska Pipeline Service Company
P.O. Box 196660
Anchorage, AK 99519-6660
before the
Subcommittee on Fisheries, Water and Wildlife
Committee on Environment and Public Works
United States Senate
regarding
Impacts of the Proposed Waters of the United States Rule
on State and Local Governments and Stakeholders

April 6, 2015

Chairman Sullivan, thank you for the opportunity to appear here today to discuss the proposed rule regarding Waters of the United States, and its possible impact on Alyeska Pipeline Service Company's management of the Trans-Alaska Pipeline System. I am Rod Hanson, Vice President of System Integrity, Engineering and Projects for Alyeska Pipeline Service Company. I joined Alyeska in 1991 as a civil/structural engineer, and have held a variety of positions in the company since then, serving as Pipeline Manager, Valdez Marine Terminal Operations and Maintenance Manager, Commercial Supply Chain Manager, and Health, Safety and Environment Director, before being appointed to my current position in late 2013. I am proud to work for an Alaska company, having lived in Alaska since 1978. My wife and I raised our children here, and our grown children are now raising their own families in Alaska, too.

I am here representing the 1,600 Alyeska employees and contractors who operate and maintain the 800-mile Trans-Alaska Pipeline System or TAPS, transporting crude oil from Alaska's North Slope to Valdez, where it is shipped to the West Coast of the lower 48. Today, TAPS carries about 5½ percent of the nation's domestic oil production. Since startup in June 1977, we have transported more than 17 billion barrels of crude oil. At peak, we transported 2.1 million barrels per day, which was 24 percent of US domestic crude oil supply. However, production from

existing development on the North Slope has been declining by approximately 3 to 6 percent per year. We currently transport approximately 514,000 barrels per day.

Transporting lower volumes of crude oil, known as "throughput," creates serious operational challenges. Lower throughput means significantly longer transport times and therefore, lower crude temperatures. Colder crude oil creates potential for wax and ice to build up in the pipeline and interfere with operations. To keep the pipeline operating safely while moving decreasing volumes, we must make significant new investments to adapt the pipeline to lower throughputs and lower temperatures. The changing hydraulic profile on TAPS has already triggered the replacement of our mainline pumps and in-station piping. We have also had to add infrastructure for recirculation to heat the oil, additional pigging to clean the pipe, and an additional pig launcher and receiver.

While we are confident in our handling of these and other issues that require significant attention and considerable resources and investment, we know that these challenges will grow as long as throughput continues to decline. We continue to meet these challenges in accordance with our robust environmental compliance programs, policies and procedures. We, as a company, are committed to protecting the Alaska environment in which we work, and this includes protecting the nation's waters. Therefore, we fully support efforts to protect and maintain the quality of those waters.

Our work on TAPS is overseen by twenty-one different federal and state agencies, each with its own authorizing legislation and accompanying regulations. We work hard to ensure we comply with all regulations; we obtain all permits and authorizations as required, and we keep our regulators informed of the status of the work we are doing to ensure the safety and integrity of our system.

Occasionally though, a new regulation is proposed which does not seem to consider the arctic environment of Alaska or the practical difficulties of operating an 800-mile pipeline through harsh climates and remote diverse landscapes, and which therefore presents unique challenges for companies like ours. That is the case with the proposed rule on Waters of the United States.

Under our reading of the proposal, it would significantly expand Clean Water Act jurisdiction to cover many more waterbodies and features than currently are covered under the law. As a result, we believe this proposed rule will subject many more TAPS activities and operations to regulation under the Clean Water Act than currently are covered by the statute and regulations. Many of the discharges associated with TAPS operations consist of water removed from construction project sites and drainage from precipitation events which do not reach Waters of the United States. The expansive definition of Waters of the United States could make these discharges jurisdictional, and subject to Clean Water Act permitting and regulatory requirements. This could significantly delay our ability to get critical work done, in the short season we have to do that work in Alaska, by causing delays in screening, permitting and other approvals for critical inspection, repair and maintenance projects. The proposed rule may also require new or significant changes of our water discharge management and treatment strategies and systems.

In reviewing the proposed rule, we have identified numerous potential impacts to TAPS and our operations. These include, but are not limited to, the following:

- Unique geographical and water features common to Alaska (permafrost, wet tundra, muskegs/bogs, etc.) may end up being considered jurisdictional waters, or result in designation of other waters as jurisdictional that have not normally been qualified as waters of the United States. Therefore, any TAPS discharges to upland, dry, and isolated areas that are hydrologically connected to or even in the vicinity of these geographical and water features may become subject to the Clean Water Act requirements;

- Discharges to dry stream channels, tundra and upland areas could now be considered discharges to jurisdictional waters and subject to new or additional permitting and treatment requirements;

- Manmade impoundments, retention structures, ditches, effluent channels and storage pits may themselves become jurisdictional under the proposal. This could extend jurisdiction to engineered structures and features associated with wastewater management or treatment, including impoundments and conveyance systems, such as stormwater

management structures and surge and oil spill ponds designed to minimize environmental risks at the Valdez Marine Terminal;

- If these engineered stormwater management features and structures were to be considered jurisdictional waters, we may be required to manage the water quality *within* these features and structures, as well as the water quality at the end point source discharges downstream;

- These same concerns arise with *naturally* occurring stormwater drainage features, such as road-side ditches and other natural culverts on or adjacent to TAPS property;

- Numerous individual projects that qualify for coverage under Clean Water Act section 404 Nationwide Permits may no longer qualify, and therefore would require permit coverage through the more lengthy and onerous individual section 404 discharge permit process in order to proceed;

- Measures employed by Alyeska for pipeline protection and stability projects along our right-of-way in areas not currently considered jurisdictional may now be covered, requiring individual permits for the placement of materials, such as soils or riprap; and,

- Even gravel pits formerly used by Alyeska and other operators could be subject to Clean Water Act requirements, since manmade impoundments, such as ponds, lagoons or other water storage structures could be considered jurisdictional.

These are just a few of the ways we believe the proposed rule could impact our management of TAPS if it were to be promulgated in its current form. We are hopeful that the proposal will be withdrawn, or dramatically changed, so that these impacts are not added to our current challenges. We at Alyeska take pride in our ability to meet all of our challenges, safely operating our pipeline system in a difficult environment.

Safety and integrity of the pipeline are core values at Alyeska and top priorities for every employee. I am proud to report that we currently have the best safety record in our history. We were recently named one of the World's Most Ethical Companies by the Ethisphere Institute for

the fourth year in a row. Alyeska's Vessel of Opportunity Program received a 2015 Alaska Ocean Leadership Award for stewardship and sustainability from the Alaska SeaLife Center. Just last week, we received a Governor's Safety Award. And, over the years, we have been honored several times with both the American Petroleum Institute's Distinguished Operator Award and Environmental Performance Award. Our record for protecting the environment is one of the best in our industry or any other industry in Alaska. We will continue to work to achieve the same high level of performance, delivering oil to the State of Alaska and the country in a safe and secure manner.

Thank you for the opportunity to testify today. I will be happy to answer any questions.

Senator SULLIVAN. Thanks again, Mr. Hanson, and congratulations on those important awards that you listed there at the end.

Our next witness is Kathie Wasserman, who is Executive Director of the Alaska Municipal League.

STATEMENT OF KATHIE WASSERMAN, EXECUTIVE DIRECTOR, ALASKA MUNICIPAL LEAGUE

Ms. WASSERMAN. Senator Sullivan, thank you for the opportunity to testify on "Waters of the U.S."

My name is Kathie Wasserman. I'm Executive Director of the Alaska Municipal League, a membership league made up of all 164 cities and boroughs throughout the State of Alaska.

The cities and boroughs in Alaska are diverse. They vary in their types of natural resources that they contain, their social and political environments, their culture, their economies and, to a degree, the powers that they are allowed under Alaska State law. Many of the duties that Alaska's municipalities have are required or mandated by State law. They have varying degrees of authority, with regards to roads, bridges, property taxes, schools, recordkeeping, elections, hospitals, economic development, land use planning, zoning and air and water quality.

Cities and boroughs own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule, including roads and roadside ditches, bridges, stormwater systems, maintenance projects, drinking water facilities and infrastructure that was never designed to meet new CWA requirements under the proposed rule.

Cities and boroughs are responsible for a large percentage of the road maintenance, such as snowplowing, debris clean up and surface repairs. Many of these small roads are in rural areas. Any additional cost burdens are challenging to these small governments. As Alaska's municipalities realize cuts in State Revenue Sharing, the potential loss of Timber Receipts, or Secure Funding for Rural Schools, and the tenuous situation with PILT, which is Payment in Lieu of Taxes, historically provide by the U.S. Government, it now seems to reflect a lack of analysis by that same Federal Government to mandate added extra expenses, while at the same time making economic development more difficult and while still considering not paying Alaska's municipalities' PILT payments for their property taxes that they—for which they own inside each municipality.

I know what municipalities do to the local taxpayer if they don't pay their taxes. We're not in the position yet to do that to the local governments, but I certainly have suggested that to my local government.

According to a 2014 County Economic Tracker report released by NACo, it found that only 65 of the Nation's 3,069 counties, boroughs or parishes have fully recovered to pre-recession levels. Many State and local projects would be significantly impacted by the changes to the definition of "waters of the U.S." that have been proposed.

Therefore, the Alaska Municipal League and all 164 municipalities urge and have urged the agency to withdraw the proposed rule until further analysis of its potential impacts have been completed.

Most of Alaska's municipalities are situated in low-lying areas with large bodies of water near the municipality. Simply, the choice of habitation by Alaska Natives, the first Alaskans, was dictated, in large part, by the accessibility of salt and freshwater; for either travel, drinking and the foods contained therein.

If the U.S. Government had bothered to talk to local Alaska governments and tribes, they would have realized that planning and zoning regulations in our respective communities are already put in place to minimize impacts to those lakes, streams, rivers, and springs. Municipalities encourage the preservation of wildlife corridors, being as so many of our people live a subsistence lifestyle. We protect vistas, archeological sites, national land characteristics and fish habitat.

The original settlers of this great State survive still through subsistence. Far be it for of the Federal Government to tell these people how to take care of the land and its resources for the long haul.

This also brings up the legal question as to how this ruling would work on privately owned Native corporation lands, as much of these lands lie within municipal jurisdictions.

Municipalities are the first line of defense for disasters: Police, firefighting, emergency personnel are the first on the scene. In the aftermath of the city of Galena flood, while FEMA responded in what could be called a reasonable amount of time, it was the residents and the city government and the tribes that did everything possible to help make sure that the community would come back to what it once was and to protect themselves from what might come again.

While many of Alaska's communities are doing everything possible to protect themselves from Alaska's large ever-changing rivers, with the record of huge erosion problems and catastrophic floods, the U.S. Government, through EPA, is adamant about Alaska's communities protecting every water-filled ditch.

We just believe, Senator Sullivan, that as municipalities in the State of Alaska, are the ones that will be tasked along with the State and tribes in implementing these rules, that the fact that we were not—that we were not contacted in any great form is a terrible, terrible thing to do to Alaska's municipalities.

As I told you before—and I have some records to give to your staff—we found out about a meeting that was held by EPA. I have the brochure. It says it was an opportunity for tribes, local government and State government to give input on an EPA proposed rule. I got the notice from another organization late on a Friday night. The meeting was on a Wednesday.

One of my mayors that deals with EPA rules negatively all the time lives in Unalaska. It would have taken her—she would have had to leave Tuesday or Monday to even get there. I called EPA in Washington, DC, and was told that oh, they didn't have our phone number. I don't know what that means, but—also, I have a copy of all the maps that are on the EPA website. None of them include Alaska. And when I asked the EPA gentleman in Washington, DC, a couple of months ago why they did not include Alaska, I was told because esthetically, it just didn't look right.

I probably have a little bit harder line. I just think this is despicable that we have been left out in the cold on this.

Thank you, Senator. Obviously, I got off my writing.

Senator SULLIVAN. No, no. That was great testimony. And thank you for flying in to Anchorage for this important hearing. Thank you very much.

Ms. WASSERMAN. Thank you.

[The prepared statement of Ms. Wasserman follows:]

Thank you, Senator Sullivan, for the opportunity to testify on "Waters of the US."

My name is Kathie Wasserman. I am Executive Director of the Alaska Municipal League; a membership League made up of all 164 cities and boroughs throughout the State of Alaska.

Cities and boroughs throughout the State of Alaska are quite diverse. They vary in the types of natural resources that they contain, their social and political environment, their culture, their economies and, to a degree, the powers they are allowed under Alaska state law. Many of the duties that Alaska's municipalities have, are required or mandated by State law. They have varying degrees of authority with regards to roads, bridges, property taxes, schools, record keeping, elections, hospitals, economic development, land use planning and zoning and air and water quality.

Cities and boroughs own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule, including roads and roadside ditches, bridges, storm water systems, maintenance projects, drinking water facilities and infrastructure that was never designed to meet new CWA requirements. Cities and boroughs are responsible for a large percentage of road maintenance, such as snow plowing, debris clean-up, and surface repairs. Many of these small roads are in rural areas. Any additional cost burdens are challenging to these small governments. As Alaska's municipalities realize cuts in State Revenue Sharing, the potential loss of Timber Receipts (Secure Funding for Rural Schools) and the tenuous situation with PILT (Payment in Lieu of Taxes), historically provided by the U.S. government, it now seems to reflect a lack of "analysis" by that same government to mandate added, extra expenses, while at the same making economic development more difficult and while yet considering NOT paying property taxes through PILT.

According to a 2014 County Economic Tracker[1] report released by NACo (National Association of Counties) in January, found that only 65 of the nation's 3,069 counties/boroughs/parishes have fully recovered to pre-recession levels. Many Alaskan projects (State and local) would be significantly affected by the changes to the definition of "waters of the U.S." that have been proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps.). Therefore, the Alaska Municipal League urges the agencies to withdraw the proposed rule until further analysis of its potential impacts has been completed.

Most of Alaska's municipalities are situated in low-lying areas with large bodies of water near the municipality. Simply, the choice of habitation by the First Alaskans was dictated in large part by the accessibility of salt and fresh water; for either travel and drinking and the foods contained therein. If the U.S. government had talked to local Alaskan governments, they would have realized that planning and zoning regulations in our respective communities, are put in place to minimize impacts to lakes, streams, rivers, and springs. Municipalities encourage the preservation of wildlife corridors,

[1] National Association of Counties, County Tracker 2014; On the Path to Recovery, NACo Trends Analysis Paper Series, (2014).

scenic vistas, archaeological sites, natural land characteristics and fish habitat. The original settlers of this great State survive through subsistence. Far be it for the federal government to tell these people, how to take care of the land and its resources for the long-haul. This also brings up the legal question as to how this ruling would work on privately owned Native Corporation lands, as much of these lands lie within municipal jurisdictions.[2]

As local Alaskan governments are major owners of much of the infrastructure in this State, we feel that we are important stakeholders in this decision. The properties that will potentially be impacted by this ruling include municipal airports, roadside ditches, flood control channels, storm water culverts and pipes, municipal storm sewer systems and other means with which to funnel water away from low-lying roads, properties and businesses.

Municipalities are also the first line of defense in any disaster. Following a major disaster, municipal police, firefighters and emergency personnel are the first on the scene. In the aftermath, municipalities focus on clean-up, recovery and rebuilding. For example, a major flood enveloped the City of Galena. While FEMA responded within what might be called a reasonable amount of time, it was the residents and government of Galena that shouldered most of the burden. While many of Alaska's communities are doing everything possible to protect themselves from Alaska's large, ever-changing rivers, with the record of huge erosion problems and catastrophic floods, the U.S. government is adamant about Alaska's communities protecting every water-filled ditch.

As Alaskan municipalities are responsible for implementing CWA programs, it is important that the Federal government work with us to form practical and workable rules and regulations that achieve the shared goals of protecting clean water, ensuring the safety of our communities and minimizing unnecessary delays and costs. As part of the Regulatory Flexibility Act, the agencies must certify that the proposed rule does not have a significant economic impact on a substantial number of small entities. Small entities are defined as small businesses and organizations, cities, counties/boroughs, school districts and special districts with a population below 50,000. To certify a proposed rule, federal agencies must provide a "factual basis" to determine that a rule does not impact small entities. If the agencies are unable to certify that a proposed rule does not impact small entities, the agencies are required to convene a small business advocacy review panel. The agencies determined, in this situation, that there was no "significant economic impact on a substantial number of small entities," and therefore did not provide the necessary review. Out of 164 municipalities in the State of Alaska, 160 meet the criteria of a "small entity." Further, because a thorough consultation process was not followed, the agencies released an incomplete and inaccurate economic analysis that did not fully capture the potential impact on other Clean Water Act programs.[3]

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[2] Definition of Waters of the U.S. Under the Clean Water Act, 79 Fed. Reg. 22188 (April 21, 2014) at 22200.
[3] Econ. Analysis of Proposed Revised Definition of Waters of the U.S., U.S. EPA Agency & U.S. Army Corps of Engineers, 11 (March 2014).

Late on the afternoon of August 8th, I received a message from the National Association of Counties, stating that they had been asked to make sure that the Executive Directors of the Leagues from the western states were aware of a meeting taking place in Tacoma, Washington on Waters of the U.S. This meeting was hosted by the EPA's Local Government Advisory Committee. The brochure that NACo sent me, also stated that input as a State, local, or tribal official will assist in providing valuable advice to Ms. Gina McCarthy. The brochure and accompanying letter had been sent out by the EPA on July 18th. I could not find an Alaskan municipality who had been contacted. If not for NACo, my office would also not have known. A trip to Washington for any of my members, is at least a day's travel by air and also includes at least two hotel nights. The meeting was scheduled for August 13th which was three business days away, meaning travel arrangements would give someone two days (at the most) to make reservations, work on comments and get down to Seattle/Tacoma. I called EPA in Washington D.C. and they seemed quite surprised that no one had bothered to contact Alaska's public officials.

To summarize:

- **Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on Alaska's cities and boroughs who are legally responsible for maintaining storm water systems, infrastructure, etc.**

- **Changes to the scope of the "waters of the U.S." definition, without a true understanding of the direct and indirect impact and costs to state and local governments, puts Alaskan local governments in a precarious position, choosing between environmental protection and public safety and also, the dire need for improved economic development.**

- **Alaska's geography will see Alaska's municipalities most likely impacted more than any other state. Given time, it would not be surprising to find EPA simply deem Alaska as a "water of the U.S."**

- **Throughout the entire rule-making process, state and local governments were not adequately consulted through the Regulatory Flexibility Act (RFA).**

- **The agencies determined there was no "Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE).** This was obviously important enough for someone in the Federal government to even make an acronym for it.

- **Under Executive Order 13132 – Federalism, federal agencies are required to work with state and local governments on proposed regulations that will have a substantial direct impact on state and local governments.**[4] Under this rule, agencies must consult with state and local officials early in the process

[4] Exec. Order No. 13132, 79 Fed. Reg. 43,255 (August 20, 1999).

> and must include in the final draft regulation, a federalism summary impact statement, which must include a detailed overview of state and local government concerns and describe the extent the agencies were able to address the concerns. A federalism impact statement was not included with the proposed rule.

Again, the Alaska Municipal League, on behalf of all 164 of Alaska's cities and boroughs, thanks you for the opportunity to comment on Waters of the U.S. This is a clear example of mandated expanded regulations imposed on local governments while at the same time, the U.S. government finds reasons to not provide funds available for current programs, much less for new expanded programs. We, in Alaska, know better than anyone that "one size fits all" more often than not, does NOT fit Alaska.

Respectfully submitted,

Kathie Wasserman
Executive Director
Alaska Municipal League

Senator SULLIVAN. Our next witness will be Lorali Simon, who is Vice President for External Affairs at the Usibelli Coal Mine.

STATEMENT OF LORALI SIMON, VICE PRESIDENT, EXTERNAL AFFAIRS, USIBELLI COAL MINE

Ms. SIMON. Good morning. Thank you, Senator.

My name is Lorali Simon. I'm Vice President of External Affairs for Usibelli Coal Mine. I certainly appreciate the opportunity to come before you today to discuss the proposed rule regarding the expansion of the definition of the "waters of the United States" and its potential impacts to Alaska.

Usibelli is celebrating our 72nd year in operation this year. We proudly supply 100 percent of the in-State demand to six coal-fired power plants in Alaska. We also supply coal to our export customers in Chile, South Korea and Japan. Currently Usibelli employs 115 people. The average wage paid to Usibelli employees is more than double the average wage in Alaska. Usibelli's operations directly provide 25 percent of all employment for Healy year-round residents. The $12.9 million paid to our Healy employees in 2013 represented nearly 60 percent of all wages paid to Healy residents.

Usibelli is deeply concerned about the proposed rule by the EPA which would significantly increase the jurisdictional waters of the United States under the Clean Water Act. Should this proposed rule be finalized, it would likely stop all development in Alaska; small, private developments, as well as large resource development projects.

The proposed rule expands Federal jurisdiction over State lands, to include all ephemeral and intermittent drainages, seeps, and marginal wetlands. According to the EPA's website, the proposed rule determines that all streams regardless of size or how frequently they flow are jurisdictional waters; all wetlands and open waters in floodplains and riparian areas are jurisdictional waters; and that there is insufficient information to generalize jurisdiction of waters not in floodplains or riparian areas.

You've already heard this today, but Alaska is very unique, in that over 60 percent of our State is already under Federal jurisdiction, and 88 percent of the jurisdictional waters are under public management. We believe this proposed rule will subject many more mining activities and operations to regulation under the Clean Water Act than currently are covered by law or regulation.

You have also already heard about Alaska's unique features, such as our permafrost and tundra that could be considered jurisdictional waters. The mining industry uses sophisticated and engineered structures, such as impoundments, ditches, channels, ponds, and pits that could also become jurisdictional waters under the proposed rule.

I hope you understand our concern over the possibility that historically non-jurisdictional onsite stormwater and surface water management features could be deemed jurisdictional, and the complications surrounding distinguishing ephemeral tributaries from non-jurisdictional features, will increase delays, costs, and permitting requirements. Usibelli is troubled by the breadth of the definitions in the proposed rule, which could be misconstrued as encom-

passing previously non-jurisdictional waters and treatment systems on mine sites across the Country.

As you know, the EPA and the U.S. Corps currently require compensatory mitigation to promote no net loss of wetlands from development projects. Anyone wishing to obtain a permit to impact a wetland or other aquatic resource must first avoid and minimize impacts, and then compensate for unavoidable impacts. Typically, for every one acre disturbed, there must be 3 to 10 acres preserved.

If the proposed expansion of jurisdictional waters becomes final, it will be nearly impossible in Alaska to meet the compensatory mitigation requirements, as most of the wetlands in Alaska are already under public management and not available for selection. The result will be an increase in price for the small amount of land remaining available for compensatory mitigation.

The local, statewide, national, and global economic benefits that mining provides are unquestionable. These benefits are derived from employment, wages, economic activity due to purchases of goods and services, and payment of taxes, royalties, and fees to local, State and national governments.

Usibelli is committed to conduct our activities in a manner that recognizes the needs of society and the needs for economic prosperity, national security, and a healthy environment. Accordingly, Usibelli is committed to integrating social, environmental, and economic principles in our mining operations from exploration through development, operation, reclamation, closure, and post-closure activities.

I would also like to point out that Usibelli is also a recent recipient of the Governor's Safety Award, and that last year we celebrated 703 days without a lost-time injury.

Thank you for the opportunity to testify today, Senator. And I'm happy to answer your questions.

[The prepared statement of Ms. Simon follows:]

Statement of Lorali Simon
Vice President, External Affairs
Usibelli Coal Mine, Inc.
P.O. Box 1000
Healy, Alaska 99743

before the
Subcommittee on Fisheries, Water and Wildlife
Committee on Environment and Public Works
United States Senate

regarding
Impacts on the Proposed Waters of the United States Rule
on State and Local Governments and Stakeholers

April 6, 2015
10:00 a.m.
Loussac Library Assembly Chambers
3600 Denali Street
Anchorage, Alaska 99503

Lorali Simon
Vice President, External Affairs
Usibelli Coal Mine, Inc.

Testimony on the Impacts of the Proposed Waters of the United States Rule on State and Local Governments and Stakeholders
Before Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water and Wildlife
April 6, 2015

Good morning Chairman Sullivan and members of the committee. Thank you for the opportunity to come before you today to discuss the proposed rule regarding the expansion of the definition of Waters of the United States, and its potential impacts on Usibelli Coal Mine. My name is Lorali Simon; I am the Vice President of External Affairs at Usibelli Coal Mine. We are celebrating our 72nd year of operation. Usibelli proudly supplies 100 percent of the instate demand to six coal-fired power plants, as well as exports close to one million tons of coal to customers in Chile, South Korea and Japan. Usibelli currently employs 115 people. The average wage paid to Usibelli employees is more than double the average wage in Alaska. Usibelli's operations directly provide 25 percent of all employment for Healy year-round residents. The $12.9 million paid to our Healy employees in 2013 represented nearly 60 percent of all wages paid to Healy residents.

Usibelli is deeply concerned about a proposed rule by the Environmental Protection Agency which would significantly increase the jurisdictional waters of the United States under the Clean Water Act. Should this proposed rule be finalized, it will likely stop all development in Alaska – small, private developments, as well as large resource development projects.

The proposed rule expands federal jurisdiction over State lands to include all ephemeral and intermittent drainages, seeps, and marginal wetlands. According to the EPA's website the proposed rule determines that all streams regardless of size or how frequently they flow are jurisdictional waters; all wetlands and open waters in flood plains and riparian areas are jurisdictional waters; and that there is insufficient information to generalize jurisdiction of waters not in flood plains or riparian areas.

An illustration of the extent of the federal jurisdictional expansion of state lands was conducted by the Waters Advocacy Coalition for a section of Kentucky. A map of Alaska would look worse. Alaska is unique in that 61 percent of our state is already under federal jurisdiction and 88 percent of the jurisdictional waters are under public management.

We believe this proposed rule will subject many more mining activities and operations to regulation under the Clean Water Act than currently are covered by law and regulation. Alaska has unique features such as permafrost and tundra that could be considered jurisdictional waters. The mining industry uses sophisticated and engineered structures such as impoundments, ditches, channels, ponds, and pits that could also become jurisdictional waters under the proposed rule. I hope you understand our concern over the possibility that historically non-

jurisdictional on-site stormwater and surface water management features will be deemed jurisdictional, and the complications surrounding distinguishing ephemeral tributaries from non-jurisdictional features, will increase delays, costs, and permitting requirements. Usibelli is troubled by the breadth of the definitions in the proposed rule, which could be misconstrued as encompassing previously non-jurisdictional waters and treatment systems on mine sites across the country.

As you know, the EPA and the U.S. Army Corps of Engineers currently require compensatory mitigation to promote no net loss of wetlands from development projects. Anyone wishing to obtain a permit to impact a wetland or other aquatic resource must first avoid and minimize impacts, and then compensate for unavoidable impacts. Typically, for every one acre disturbed, there must be three to 10 acres preserved. If the proposed expansion of jurisdictional waters becomes final, it will be *nearly impossible in Alaska* to meet the compensatory mitigation requirements, as most of the wetlands in Alaska are already under public management and not available for selection. The result will be an increase in price for the small amount of land remaining available for compensatory mitigation.

The local, statewide, national, and global economic benefits that mining provides are unquestionable. These benefits are derived from employment, wages, economic activity due to purchases of goods and services, and payment of taxes, royalties, and fees to local, state and national governments. Usibelli is committed to conduct our activities in a manner that recognizes the needs of society and the needs for economic prosperity, national security, and a healthy environment. Accordingly, Usibelli is committed to integrating social, environmental, and economic principles in our mining operations from exploration through development, operation, reclamation, closure, and post-closure activities.

Thank you for the opportunity to testify today. I am happy to answer your questions.

Senator SULLIVAN. Thank you, Ms. Simon. And thank you for the powerful testimony. And again, I think one of the issues you raise on the compensatory mitigation is something that we need to explore further.

Our next witness is Tim Troll. He's Executive Director for the Bristol Bay Heritage Land Trust.

Mr. Troll.

STATEMENT OF TIM TROLL, EXECUTIVE DIRECTOR, BRISTOL BAY HERITAGE LAND TRUST

Mr. TROLL. Senator Sullivan, thank you very much for the opportunity to talk here today.

My name is Tim Troll. I am Executive Director of the Bristol Bay Heritage Land Trust, an organization I helped found 15 years ago while living in Dillingham. The Bristol Bay Heritage Land Trust is one of six land trusts in Alaska that serve different geographic areas. Our service area encompasses the watersheds that flow into Bristol Bay.

Land trusts are conservation organizations that work with willing landowners to preserve places that are special: Working farms; wilderness parks; historic sites; and not surprisingly in Alaska, salmon habitat. We exist because 25 years ago the Alaska legislature adopted the Uniform Conservation Easement Act. A conservation easement is a statutory creation that allows a property owner to sell or donate development rights to a qualified organization, like a land trust, while retaining ownership.

So why would a land trust care about the water? Well, when we formed our land trust in Dillingham in 2000, our concern was for salmon habitat in the Nushagak River Watershed. The Nushagak is a giant producer of salmon in the Nation's greatest salmon stronghold, Bristol Bay. It supports a robust subsistence culture and a commercial fishery with a longevity approaching 150 years. The 20 year average for abundance of sockeye salmon alone in the Nushagak River is 1.8 million with a range of 674,000 to 3.4 million.

The problem we needed to address was the fact that except for the Wood-Tikchik State Park most of the salmon habitat in the Nushagak Watershed is not conserved. The vast majority of the watershed is owned by the State and is managed under an area plan that does not guarantee permanent protection for salmon habitat. The uplands along the lower river corridor are private lands owned by the Alaska Native corporations, five Alaska Native corporations, and more than 300 individual Native allotments.

So looking into the future and taking an admittedly jaundiced view of human nature we could foresee a time when this fragmentation of ownership and land management could lead to habitat fragmentation and the loss of connectivity between lakes, rivers and streams, those that salmon need most to survive.

We decided that one way we could protect the habitat and hopefully get ahead of history was to document salmon streams and nominate previously undocumented streams for inclusion in Alaska's Anadromous Waters Catalog. Once a stream is in the catalog, State law provides a higher level of protection because an anadromous stream cannot be disturbed without a permit from the

Habitat Division of ADF&G. Most of the streams in the headwaters of the Nushagak are undocumented because they are remote and can only be accessed by helicopter.

We launched our effort in the late summer of 2008 with funding and other support provided by various Native partners, including the Native tribes of the Nushagak River. The biologists we engaged sample streams using backpack electro-fishers. Sampling is done in late summer when rearing salmon have generally gone as far up into the headwaters as they can. Fish are stunned, identified, measured, occasionally photographed, and returned to the water. All sampling sites are georeferenced, and each year before September 30, we submit all the information we gather to ADF&G. Salmon observations are added to the Anadromous Waters Catalog and other fish observations are added to Alaska's Freshwater Fish Inventory.

I've been fortunate to go along on many of these sampling trips. I'm not a scientist, I'm a lawyer, but they invited me anyway. Over the last 6 years, I've stood in many little tundra streams barely a foot wide, burrowed down into alder-choked creeks and sunk up to my waist in muddy-bottom sloughs. To my astonishment, we have found fish in all of these places, and often salmon. Particularly surprising for me was to land near some isolated pocket of water above a dry streambed and still find rearing coho salmon. No surprise to our biologists and no surprise to the Native folks who often joined us on our surveys.

So we have logged hundreds of hours in helicopters sampling hundreds of headwater streams in Bristol Bay looking for fish. We find fish in virtually every place we sample, and salmon in most. We have raised and spent hundreds of thousands of dollars to add hundreds of stream miles to the Anadromous Waters Catalog.

But it doesn't take a biologist to help us understand the significance of these little creeks, mud holes, backwaters, side sloughs, and even ephemeral and intermittent stream channels. Even a Senate subcommittee, if you could visit these headwaters, would have to concede the obvious: These places are the perfect breeding ground and rearing habitat for our salmon and a wide variety of other fish. Certainly, in this region, firm protection of these headwater complexes should be given. EPA's Clean Water Act rulemaking affirms the obvious and provides protection for these headwaters and ephemeral streams.

If we pretend these areas are unimportant and let them fall victim to abuse, then, as history has shown, everything downstream could be lost: No salmon; no commercial fishery; no world-class fly fishing; no bears; no belugas; no Natives; no economy, and no reason to protect the land.

Thank you, Senator.

[The prepared statement of Mr. Troll follows:]

Tim Troll, Executive Director, Bristol Bay Heritage Land Trust

Testimony before the Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water and Wildlife

April 6, 2005, Anchorage, AK

My name is Tim Troll. I came to Alaska in 1978 as a VISTA volunteer attorney for Alaska Legal Services in Bethel. Since then, in addition to practicing law, I've served many years as a rural city manager and CEO of an Alaska Native village corporation. I have also spent some time crewing on commercial fishing boats on both the Lower Yukon and in Bristol Bay. I am currently the Executive Director of the Bristol Bay Heritage Land Trust, an organization I helped found fifteen years ago while living in Dillingham. The Bristol Bay Heritage Land Trust is one of six land trusts in Alaska that serve different geographic areas. Our service area encompasses the watersheds that flow into Bristol Bay.

Land Trusts are conservation organizations that work with willing landowners to preserve places that are special – working farms, wilderness, parks, historic sites and, not surprisingly in Alaska, salmon habitat. We exist because 25 years ago the Alaska legislature adopted the Uniform Conservation Easement Act. A conservation easement is a statutory creation that allows a property owner to sell or donate development rights to a qualified organization while retaining ownership. Together we estimate our trusts have conserved over 40,000 acres of open space, wetlands, wildlife habitat, areas for hunting, fishing, hiking and subsistence, 8 working family farms and well over 50 miles of shore line along salmon streams.

So why would a land trust care about the water? When we formed our land trust in Dillingham in 2000 it was out of concern for salmon. The Nushagak is a giant producer of salmon in the nation's greatest salmon stronghold - Bristol Bay. It supports a robust subsistence culture and a commercial fishery with a longevity approaching 150 years. The 20-year average for abundance of sockeye salmon alone in the Nushagak River is 1.8 million with a range of 674,000 to 3.4 million.

Our concern in the Nushagak is that most of its salmon habitat is not conserved. The vast majority of the watershed is owned by the State and is managed under an area plan that does not guarantee permanent protection for salmon habitat. The uplands along the lower river corridor are private lands owned by five Alaska Native corporations and more than 300 individual Native allotment owners. Looking into the future and taking an admittedly jaundiced view of human nature we could foresee a time when this fragmentation of ownership and land management in the Nushagak

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watershed could lead to habitat fragmentation and the loss of connectivity between the lakes, rivers and streams these salmon need to survive.

To get ahead of history we helped the Nushagak-Mulchatna Watershed Council develop a conservation plan called the *Nushagak River Watershed Traditional Use Area Conservation Plan.* In addition to strategies to protect land, the Council outlined strategies in the Plan to protect water. Key among the water strategies is documenting salmon streams and submitting previously undocumented streams for inclusion in Alaska's Anadromous Waters Catalog. Once a stream is in the catalog it cannot be disturbed without a permit from the Alaska Department of Fish & Game. (ADF&G). ADF&G requires more stringent permit requirements if a stream is in the Catalog. Most of the streams in the headwaters of the Nushagak are undocumented because they are remote and can only be accessed with a helicopter.

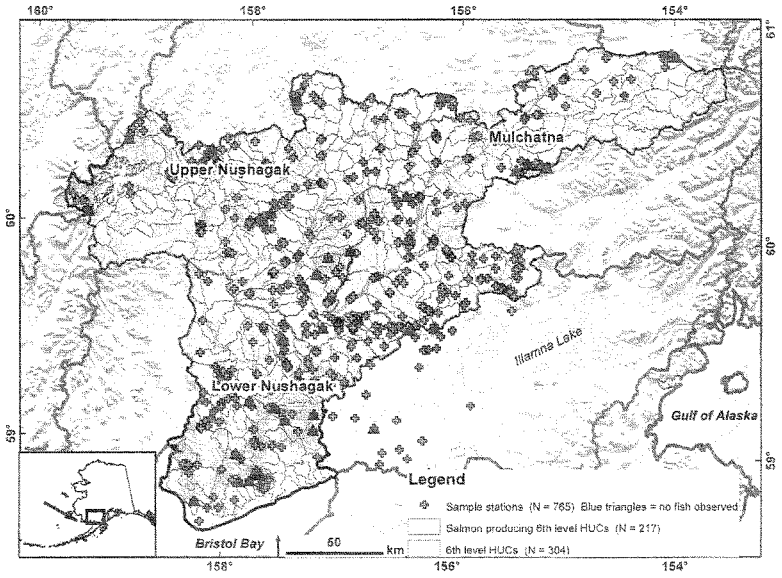
We launched our effort in the late summer of 2008 with funding and other support from various partners including the tribes of the Nushagak River, The Nature Conservancy and Bristol Bay Native Association. The biologists we engaged sample streams using backpack electro-fishing in accordance with protocols established by ADF&G. Sampling is done in late summer when rearing salmon have generally gone as far up into the headwaters as they can. Fish are stunned, identified, measured, occasionally photographed, and returned to the water. All sampling sites are geo-referenced and each year before September 30 we submit all the information we gathered to ADF&G. Salmon observations are added to the Anadromous Waters Catalog and other fish observations are added to Alaska's Freshwater Fish Inventory.

I have been fortunate to go along on many of these sampling trips. Over the last 6 years I've stood in many little tundra streamlets barely a foot wide, burrowed down into alder choked creeks and sunk up to my waste in muddy bottom sloughs. To my astonishment we have found fish in all of these places, and often salmon. Particularly surprising for me was to land near some isolated pocket of water above a dry streambed and still find rearing coho salmon. No surprise to our biologists, or to the Native folks who joined us on our surveys.

We have sampled hundreds of headwater streams in Bristol Bay and points along those streams looking for fish. We find fish in virtually every place we sample and salmon in most. We have raised and spent hundreds of thousands of dollars to add hundreds of stream miles to the Anadromous Waters Catalog. All of this data is being processed into a model that hopefully will help us understand the physical and biological factors in this region that likely determine the extent of streams occupied by salmon and other fish. Such a model will be helpful for predicting where fish are and what fish are likely to be at any given location without having to fly a helicopter to the thousands of small streams and ponds that have not been sampled, and likely never will.

But it doesn't take a biologist, or even a scientific model, to help us understand the significance of these little creeks, mud holes, backwaters, side sloughs and even ephemeral and intermittent stream channels. Even a lawyer like myself must concede the obvious – these places are the perfect breeding ground and rearing habitat for our salmon and a wide variety of other fish. Certainly, in this region, firm protection of these headwater complexes should be a given. The Clean Water Act rulemaking affirms protection for these headwaters and ephemeral streams. Without protection everything downstream could be lost – no commercial fishery, no world class fly fishing, no bears, no belugas, no Natives, no economy. No reason to protect the land.

As a result of our sampling and sampling conducted by ADF&G and others it is possible to generate the following map showing which headwater basins in the Nushagak watershed are used by salmon. All of them are used by fish.



Senator SULLIVAN. Thank you, Mr. Troll.

Our next witness is Mr. Sam Kunaknana. He's Tribal President of the Native Village of Nuiqsut.

STATEMENT OF SAMUEL KUNAKNANA, TRIBAL PRESIDENT, NATIVE VILLAGE OF NUIQSUT

Mr. KUNAKNANA. Good morning, good morning. My name is Samuel C. Kunaknana, Tribal President of the Tribal Council of the Native Village of Nuiqsut, a federally recognized tribe of Alaska Native people. Before I begin I would like to thank the esteemed members of this committee for allowing me to testify on behalf of the people of my tribe.

As Tribal President, I represent the Native Colville River Delta people, a group known as Kuukpigmiut, and as their representative I want to communicate just how important clean water is in sustaining the subsistence resources of my community. For thousands of years the Inupiat people of the North Slope have subsisted on the bountiful natural resources of our region. We rely upon marine and land mammals and waterfowl to maintain food security.

Traditional subsistence foods of our region maintain the health of all our people, and with the magnitude of oil and gas development on the North Slope in recent times, access to these resources has become more and more limited. Recently the quality of our subsistence resources has now begun to suffer in large part due to problems related to the quality of our waters.

The tundra of the North Slope on which we live might best be described as an aquatic environment, the hydrology of which is quite complex. The Inupiat people rely upon a wealth of traditional knowledge passed from one generation to the next via stories and word of mouth. We do not rely upon reference scientific documentation to understand the interconnectedness of our environment, instead we have lived it for thousands of years.

We know that water flows across the surface quite freely during the warm season and that our hydrology involves not only surface waterflow but the subterranean movement of the water as well. Water that runs over the land in spring and summer not only moves from one waterway to the next, but interflow just below the surface also connects these waterways.

All of these water systems are connected in one way or another, and they, in turn, are connected to the land surface, as well. What falls to the land surface through atmospheric deposition, including industrial compounds, ends up in the lichen that our caribou feed upon and in the waters that provide food for our fish and other sea mammals.

When I was a young boy in school, I was told of the food chain and how all of the animals and fish are connected to the environment. This was nothing new to me, as I learned it from my parents, grandparents and ancestors. This was knowledge passed from one generation to the next.

Many years of industrial development in my homeland has now resulted in water and air quality problems, and ultimately industrial aerosols are deposited on the surface to be carried into our hydrological systems that support our land and sea mammals and

waterfowl. These compounds accumulate within our systems and cause health problems for us.

We are told today that we need to limit our consumption of bird due to mercury contamination. Many of our Broad white are now diseased, and when we butcher our caribou, we find diseased organs. Within our Village of 435 people, two children have been diagnosed with leukemia and one has already passed away. What are the odds of a single child being diagnosed with such a disease within a community of 435, let alone two?

We need our better rules to control the quality of water in our region, whether the headwaters of the streams and tributaries, or wetlands that support or subsistence resources. We do understand and are working to address the loss of food security due to access problems to our subsistence resources, as our region becomes inundated with oil and gas development and perhaps mining in the future. However, it would be unconscionable to allow the health of the limited subsistence resources we have left to continue to erode due to a decline in water quality.

As an elected representative of the Native people of Nuiqsut, I fully support this Clean Water proposal, because it will protect a crucial part of the food chain that will allow my people to maintain food security with respect to the traditional foods we have relied upon for thousands of years.

Thank you very much for your time and for this opportunity to testify on this crucial issue.

Thank you.

[The prepared statement of Mr. Kunaknana follows:]

N^V^N

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Statement of Samuel Kunaknana, President Native Village of Nuiqsut Tribal Council, in support of the Army Corps of Engineers (Corps) and Environmental Protection Agency's (EPA) Clean Water proposal, for the The Senate Committee on Environment and Public Works Subcommittee on Fisheries, Wildlife, and Water, April 6, 2015, Anchorage, Alaska.

Good morning. My name is Samuel Kunaknana, and I serve as President of the Tribal Council of the Native Village of Nuiqsut, a federally recognized tribe of Alaska Native people. Before I begin, I would like to thank the esteemed members of this committee for allowing me to testify on behalf of the people of my Tribe.

As Tribal president, I represent the Native Colville River Delta people, a group known as the Kuukpikmiut, and as their representative, I want to communicate just how important clean water is in sustaining the subsistence resources of my community.

For thousands of years the Inupiaq people of the North Slope have subsisted on the bountiful natural resources of our region. We rely upon marine and land mammals and waterfowl to maintain food security. Traditional subsistence foods of our region maintain the health of all of our people, and with the magnitude of oil and gas development on the North Slope in recent times, access to these resources has become more and more limited.

Recently, the quality of our subsistence resources has now begun to suffer, in a large part due to problems related to the quality of our waters. The tundra of the North Slope on which we live might best be described as an aquatic environment, the hydrology of which is quite complex.

The Inupiaq people rely upon a wealth of Traditional Knowledge, passed from one generation to the next via stories and word of mouth. We do not rely upon referenced scientific documentation to understand the interconnectedness of our environment; instead we have lived it for thousands of years.

We know that water flows across the surface quite freely during the warm season, and that our hydrology involves not only surface water flow, but the subterranean movement of water as well. Water than runs over the land in spring and summer not only moves from one waterway to the next, but interflow just below the surface also connects these waterways.

All of these water systems are connected in one way or another, and they in turn are connected to the land surface as well. What falls to the land surface through atmospheric deposition,

including industrial compounds, ends up in the lichen that our caribou feed upon, and in the waters that provide food for our fish and other sea mammals.

When I was a young boy in school, I was told of the food chain, and how all of the animals and fish are connected to the environment. This was nothing new to me, as I learned it from my parents, grandparents and ancestors. This was knowledge passed from one generation to the next.

Many years of industrial development in my homeland has now resulted in water and air quality problems, and ultimately industrial aerosols are deposited on the surface to be carried into our hydrological systems that support our land and sea mammals, and waterfowl. These compounds accumulate within our systems and cause health problems for us.

We are told today that we need to limit our consumption of burbot due to mercury contamination, many of our broadfish are now diseased, and when we butcher our caribou we find diseased organs.

Within our village of 435 people, two children have been diagnosed with leukemia, and one has already passed away. What are the odds of a single child being diagnosed with such a disease within a community of 435, let alone two?

We need better rules to control the quality of water in our region, whether the headwaters of streams and tributaries, or wetlands that support our subsistence resources. We do understand and are working to address the loss of food security due to access problems to our subsistence resources as our region becomes inundated with oil and gas development, and perhaps mining in the future; however, it would be unconscionable to allow the health of the limited subsistence resources we have left continue to erode due to a decline in water quality.

As an elected representative of the Native people of Nuiqsut, I fully support this clean water proposal because it will protect a crucial part of the food chain that will allow my people to maintain food security with respect to the traditional foods we have relied upon for thousands of years.

Thank you very much for your time, and for this opportunity to testify on this crucial issue.

Senator SULLIVAN. Thank you, Mr. President, and thank you for your travel all the way from Nuiqsut for this testimony. Thank you.

Mr. KUNAKNANA. Quyanaqpak.

Senator SULLIVAN. Our next witness is Brian Litmans. He's Senior Staff Attorney for Trustees for Alaska.

STATEMENT OF BRIAN LITMANS, SENIOR STAFF ATTORNEY, TRUSTEES FOR ALASKA

Mr. LITMANS. Good morning, Chairman Sullivan. My name is Brian Litmans and I am a senior staff attorney with Trustees for Alaska, a nonprofit environmental law firm providing legal counsel to protect and sustain Alaska's natural environment. Thank you for inviting me today to testify on the joint-proposed rule by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers defining "waters of the United States." I ask that my written testimony be included in the record.

This rule provides clarity and certainty on the scope of the Clean Water Act in light of the two U.S. Supreme Court decisions: Rapanos, and Solid Waste Agency of Northern Cook County. Prior to these two decisions, the regulating agencies took a more expansive view of the definition of "waters of the United States." The proposed rule narrows the definition and is consistent with the Clean Water Act, as interpreted by the U.S. Supreme Court.

The Clean Water Act sets out a national goal to restore and maintain the chemical, physical and biological integrity of our Nation's waters. The proposed rule is rooted in sound science, supported by an EPA report that reviewed more than 1,200 peer-reviewed scientific publications. The scientific literature unequivocally demonstrates that protecting upstream waters and wetlands is important to protecting the integrity of downstream waters. The rule implements the intent of the Act to protect our Nation's waters while also complying with the Court's decisions.

In Alaska, the vital role of wetlands cannot be understated. They are sociologically, ecologically and economically important to Alaska, providing essential habitat for fish and wildlife. Alaska's wetlands sustain some of the world's richest commercial, sport and subsistence fisheries. Providing such essential habitat for such a large number of fish and wildlife, these wetlands are paramount to the culture and economy of Alaska Native and rural communities. Without wetlands, that way of life would disappear.

This proposed rule is borne out of the Rapanos decision, where the justices issued five separate opinions. Chief Justice Roberts predicted the troubles to come, noting that with no one test confirmed by the Court, lower courts and regulated entities would have to feel their way on a case-by-case basis. When there is no majority opinion from the Supreme Court, the lower courts must parse through the variety of Supreme Court opinions to determine the governing rule of law. This has left the lower courts to fumble along, which in turn has only created more confusion.

Senator Inhofe, Chairman of the Environment and Public Works Committee, remarked back in 2011 that a rulemaking consistent with the Clean Water Act and the Supreme Court decisions was critical. This sentiment has also been echoed by regulated entities,

government agencies and environmental NGOs, all clamoring for rulemaking to address this problem.

At this point in time, the majority of circuits follow Justice Kennedy's significant nexus test. This is the same test EPA and the Corps now seek to implement through regulation, bringing an end to the confusion and uncertainty faced by courts and regulators. The rule provides the certainty and regulatory efficiency that the regulated entities assert is critical to both the U.S. and Alaskan economy.

A cloud has hung over the regulating agencies, the applicants, and those like Trustees for Alaska seeking to ensure the purposes and intent of the Clean Water Act are complied with. This rule removes that cloud. The rule clarifies the process to determine which streams and wetlands are protected under the Act. The rule does not expand the Act's protection to any new type of waters that have not been considered a jurisdictional water of the United States to this date.

Clean water and a healthy environment are essential to all of us. Whether it is clean water for drinking or a clean river to swim in, clean water for salmon, or clean water for today and for future generations, the Clean Water Act set out a goal that we can all agree on. This rule supports that goal.

Thank you.

[The prepared statement of Mr. Litmans follows:]

TESTIMONY OF
BRIAN LITMANS
SENIOR STAFF ATTORNEY
TRUSTEES FOR ALASKA

BEFORE THE UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

SUBCOMMITTEE
ON FISHERIES, WILDLIFE AND WATER

FIELD HEARING: *IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS*

ANCHORAGE, ALASKA

APRIL 6, 2015

Good morning Chairman Sullivan and Senator Murkowski. My name is Brian Litmans and I am a Senior Staff Attorney with Trustees for Alaska, a non-profit environmental law firm providing legal counsel to protect and sustain Alaska's natural environment. Thank you for inviting me today to testify on the Joint-Proposed Rule by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers defining "waters of the United States." This rule provides clarity and certainty on the scope of the Clean Water Act in light of two U.S. Supreme Court decisions: *Rapanos* and *Solid Waste Agency of Northern Cook County.* Prior to these two decisions, the regulating agencies took a more expansive view of the definition of waters of the United States. This proposed rule narrows that definition and is consistent with the Clean Water Act, as interpreted by the U.S. Supreme Court.

The Clean Water Act, passed in 1972, sets a national goal to restore and maintain the chemical, physical and biological integrity of our Nation's waters.[1] The proposed rule is rooted in sound science. It is supported by an EPA report that reviewed more than 1,200 peer-reviewed scientific publications. The scientific literature unequivocally demonstrates that protecting upstream waters and wetlands is important to protecting the integrity of downstream waters. The rule implements the intent of the Act to protect our Nation's waters while also complying with the Court's decisions.

In Alaska, the vital role of wetlands cannot be understated. Alaska's wetlands are sociologically, ecologically and economically important to Alaska. They provide fundamental habitat for fish and wildlife. More than 70,000 swans, 1 million geese, 12 million ducks and 100 million shorebirds depend on Alaskan wetlands for foraging and nesting.[2] They serve as

[1] 33 U.S.C. § 1251(a).

[2] National Water Summary on Wetland Resources, Alaska Wetland Resources, U.S.G.S. Water-Supply Paper 2425, 1996. Available at https://www.fws.gov/wetlands/Data/StateWaterChapters/Alaska.pdf; *see also* Status of Alaska Wetlands, U.S. Fish and Wildlife

important foraging habitat for mammals like moose, caribou, musk ox, beaver, muskrat, mink and land otter.[3] Tidal wetlands serve as rookeries and resting areas for marine mammals including seals, sea lions, and walrus.[4] And wetlands play a key role in supporting productive salmon fisheries.[5]

Alaska's wetlands sustain some of the world's richest commercial, sport and subsistence fisheries.[6] Almost 90 percent of wild salmon caught in the United States are caught in Alaskan waters.[7] The sockeye salmon fishery is the second largest – and most valuable – wild salmon fishery in North America, with 75 percent of the global catch originating in Alaskan waters.[8] Wetlands provide food, cover, and spawning habitat for Alaskan salmon and serve as passage ways from rearing and breeding grounds to the ocean.[9] Providing such essential habitat for such a large number of fish and wildlife, wetlands are paramount to the culture and economy of Alaska native and rural communities.[10] Without wetlands, that way of life would disappear.

Wetlands also provide important hydrologic and water-quality functions. They regulate flow, control erosion, transform and retain nutrients for the aquatic ecosystem, minimize flood impacts, and remove contaminants. Wetlands play a unique and important role in northern Alaska, where they reduce erosion by preventing the warming and thawing of permafrost.

This proposed rule is born of the unusual circumstance where the controlling Supreme Court decision had no majority opinion. In *Rapanos*, the justices issued five separate opinions. Chief Justice Roberts commented that "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis."[11]

Not surprisingly, applying the fractured *Rapanos* decision on a case-by-case basis has proven difficult at best. The Sixth Circuit commented that "[p]arsing any one of *Rapanos's* lengthy and technical statutory exegeses is taxing, but the real difficulty comes in determining which—if any—of the three main opinions lower courts should look to for guidance."[12] The Third Circuit explained that "the *Rapanos* opinions seem to present an analytical problem: the three opinions articulate three different views as to how courts should determine whether wetlands are subject to the CWA, and no opinion was joined by a majority of the Justices. So

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Service, Alaska Region, 1994, at 107. Available at https://www.fws.gov/ wetlands/Documents/ Status-of-Alaska-Wetlands.pdf.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Rapanos v. United States,* 547 U.S. 715, 758 (2006) (Roberts, J., concurring).

[12] *United States v. Cundiff,* 555 F.3d 200, 207 (6th Cir. 2009).

which test should apply?"[13] Perhaps the Sixth Circuit said it best: "In its short life, *Rapanos* has indeed satisfied any 'bafflement' requirement."[14]

When there is no majority opinion from the Supreme Court, the lower courts must parse through the variety of Supreme Court opinions to determine the governing rule of law. This difficult task leads to inconsistent results and confusion as to the state of the law. At this point in time, the majority of Circuits have followed Justice Kennedy's "significant nexus" test – *the same test the EPA and the Corps seek to implement through this rule.*

While the agencies' guidance offered some clarity amidst the splintered *Rapanos* decision and its aftermath, there was still a cloud of uncertainty because agency guidance is not binding. Regulated entities, state and local agencies, environmental NGOs, and many others have clamored for rulemaking to address this problem.

As Senator Inhofe, Chairman of the Senate Environment and Public Works Committee, remarked back in 2011, as the then-Ranking Member of this subcommittee, "it is critical that the Agencies take the proper steps to ensure that the regulations provide an appropriate and clear definition of 'waters of the United States' consistent with the Clean Water Act and the Supreme Court decisions."[15]

Similar sentiments were expressed in 2008 by the Alaska Miners Association, noting that the "AMA cannot overstate the importance of implementing a clearly defined, objective, and defensible wetlands determination process to forestall future lawsuits which are costly to the Federal Government as well as the mining industry . . . . We encourage [EPA and the Army Corps of Engineers] to begin the rulemaking process immediately."[16]

To ensure consistency and certainty, EPA and the Corps have proposed that the test found in the current post-*Rapanos* agency guidance become binding regulation. EPA and the Corps have taken the requisite step to address the Chairman's and the Alaska Miners Association's request by clearly defining "waters of the United States" consistent with the Clean Water Act and the *Rapanos* decision. And, in turn, they have provided the certainty to the regulated entities that they themselves assert is critical to both the U.S. and Alaskan economy.

While critics may seek to erode the intent and purposes of the Clean Water Act, this rule will provide the regulatory certainty and a less onerous and timely review of permit applications — the precise elements sought by industry and regulated entities. This rule will benefit the private sector by increasing efficiency. The rule clarifies what waters are within the regulatory authority of the EPA and the Army Corps of Engineers and what the test is to determine whether waters are jurisdictional.

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[13] *United States v. Donovan*, 661 F.3d 174, 180 (3d Cir. 2011).

[14] *Cundiff*, 555 F.3d at 208.

[15] Persons and Organizations Requesting Clarification of "Waters of the United States" By Rulemaking. Available at http://www2.epa.gov/sites/production/files/2014-03/documents/wus_request_ rulemaking.pdf.

[16] *Id.*

It is time to establish regulations that will eliminate uncertainty. A cloud has hung over the regulating agencies, the applicants, and those like Trustees for Alaska seeking to ensure the purposes and intent of the Clean Water Act are complied with. This rule removes that cloud. The rule clarified the process to determine which streams and wetlands are protected under the Act. The rule does not expand the Act's protection to any new type of waters that have not been considered a jurisdictional water of the United States to this date.

Clean water and a healthy environment are essential to all of us. Whether it is clean water for drinking or a clean river to swim in, clean water for salmon, clean water for us today or for future generations, or clean water for those who maintain a subsistence way-of-life, the Clean Water Act set out a goal we can all agree on. This rule supports that goal. Thank you.

Senator SULLIVAN. Thank you, Mr. Litmans, I appreciate you laying out some of the legal background of the rule, as well.

Our final witness is Mark Richards. He's Co-Chair of Alaska Backcountry Hunters and Anglers.

STATEMENT OF MARK RICHARDS, CHAIRMAN, ALASKA BACKCOUNTRY HUNTERS AND ANGLERS

Mr. RICHARDS. Good morning, Senator Sullivan. Thank you for the opportunity to testify before you today, and I certainly want to commend you for bringing D.C. to Alaska. We need—we need more of that.

My name is Mark Richards. I'm Chairman of the Alaska Chapter of Backcountry Hunters and Anglers. We're a national hunting and fishing conservation organization dedicated to ensuring our heritage of hunting and fishing traditions can continue through education and hard work on behalf of wild public lands and waters.

We are a grassroots, nonpartisan organization, and part of my volunteer duties as Chairman of our Alaska chapter involves attending a wide array of meetings and giving testimony on various issues that affect hunting and fishing and conservation in Alaska.

One issue we recently commented on was the National Park Service's rulemaking changes governing hunting and trapping regulations on National Preserve lands. We opposed the Service's new rulemaking because we felt it was not based on any clear scientific or conservation concern and that it was a clear example of Federal overreach.

The question before this committee, and the Country, and specifically Alaska, is whether or not this new proposed rule on "Waters of the United States," clarifying what waters are protected under the Clean Water Act and what waters are subject to Federal jurisdiction, is also Federal overreach. We don't believe that it is.

Court decisions in the last decade, as you have heard earlier, have made it unclear what waters are protected under the Clean Water Act and under Federal jurisdiction. Our Former Governor Sean Parnell, along with others, was among those who requested that the EPA and the Army Corps of Engineers clarify these issues via the rulemaking process.

This final rule will result in less waters being under Federal jurisdiction than were in place for the first 30 years of the Clean Water Act. During that same time period, when I was here, the State of Alaska saw enormous economic growth and development while our population quadrupled. We built a pipeline under the regulations of the Clean Water Act before the Supreme Court weighed in. Even when more waters were under Federal CWA jurisdiction than there are now under this new rule, Alaska prospered and development soured.

Sure, there are costs associated with regulation that govern and protect our streams and rivers and wetlands, costs to developers and industry and the private sector and communities, but those are the costs associated with clean water and healthy habitat for fish and game. Those are the costs that allowed me to drink out of the Sag River when my wife and I worked up north during the summer; those are the costs that allow me to catch a lunker Dolly

Varden out of the Sag, three miles downstream of where the Pipeline goes underneath the Sag River.

And speaking of costs, there are of course costs to the regulatory agencies, as well. Back in 2013, Senator, when you were Department of Natural Resources Commissioner under Governor Parnell, the administration sought to get primacy rights for the State of Alaska, to take over the job of wetlands regulation from the Federal Government under the Clean Water Act. The Federal laws protecting wetlands would still be in place under the Clean Water Act, but the State would take over wetlands permitting issuance from the Army Corps of Engineers. The rationale was that if the State had primacy rights, they could do as good a job as the EPA and Corps in regulating wetlands, but the State could permit development projects at a much faster pace.

As you said at the time, Senator, as DNR Commissioner, "It's not about cutting corners, it's about making our permitting more timely, efficient and certain." We support that. The problem, however, then and especially now, should the State of Alaska ever gain those primacy rights, is that the costs of assuming regulation and permitting of wetlands for the State are extremely high, and in today's fiscal climate with our ongoing budget crisis is, frankly, not achievable.

I bring up this to point out that it is extremely unlikely the State of Alaska will ever gain primacy rights from the Federal Government over wetlands, but at the same time we still need to clarify what bodies of water are under Federal jurisdiction according to the Clean Water Act.

That's what this new rule does. It clarifies what waters are under Federal jurisdiction. And it is that clarification that does not sit well with many here today because of fears of how it could impact future development and costs to individuals and businesses.

We understand and respect those concerns, but overall, the Clean Water Act has been very much a positive for our Country and for our States and communities, for our fish and game and for our hunters and anglers. We view this clarification and new rule as a positive, as well.

And we would like to say, Senator, we also have concerns. We support this new rule, but if you could, work with Senator Barrasso and others and fix the concerns that we have as a State, without going back to the starting block and starting over again. Right now, according to the Bush administration rules, things are slowed down; permitting is slowed down because we don't have this definition. So we want to see it fixed.

We understand the concerns everybody has here and we're willing to work with you.

And just thank you for the opportunity to testify and for your service to our Country, really appreciate it.

[The prepared statement of Mr. Richards follows:]

BACKCOUNTRY HUNTERS AND ANGLERS
ALASKA CHAPTER
www.alaskabackcountryhunters.org

April 3, 2015

To: Senate Environment and Public Works Subcommittee on Fisheries, Water and Wildlife

Re: April 6, 2015 hearing in Anchorage, Alaska

Testimony on the Impacts of the Proposed Waters of the United States Rule on State and Local Governments and Stakeholders

Chairman Sullivan and members of the Committee,

Thank you for the invitation to testify before you today. My name is Mark Richards and I'm the Chairman of the Alaska Chapter of Backcountry Hunters & Anglers (BHA). We are a national hunting and fishing conservation organization dedicated to ensuring our heritage of hunting and fishing traditions can continue through education and work on behalf of wild public lands and waters.

We are a grass roots non-partisan organization and part of my volunteer duties as Chairman of our Alaska chapter involves attending a wide array of meetings and giving testimony on various issues that affect hunting and fishing and conservation in Alaska.

One issue we recently commented on was the National Park Service's Rulemaking changes governing hunting and trapping regulations on National Preserve lands. We opposed the Service's new rulemaking because we felt it was not based on any clear scientific or conservation concern and that it was an example of federal overreach.

The question before this Committee, and the country and specifically Alaskans, is whether or not this proposed rule clarifying what waters are protected under the Clean Water Act and what waters are subject to federal jurisdiction, is also federal overreach.

We don't believe that it is.

Court decisions in the last decade have made it unclear what waters are protected under the Clean Water Act and under federal jurisdiction. Our former Governor Sean Parnell was among those who requested that the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) clarify these issues via the Rulemaking process.

This final Rule would result in less waters being under federal jurisdiction than were in place for the first 30 years of the Clean Water Act. During that same time period, the state of Alaska saw enormous economic growth and development while our population quadrupled. Even when more waters were under federal CWA jurisdiction than there are now with this new rule, Alaska prospered and development soared.

Sure there are costs associated with regulations that govern and protect our streams and rivers and wetlands, costs to developers and industry and the private sector and communities, but those are the costs associated with clean water and healthy habitat for our fish and game. Those are the costs associated with having sustainable fish and game populations and carrying on our hunting and fishing traditions on public lands. Those are the costs that allow me to drink out of the Sag River on the North Slope and to catch a lunker Dolly Varden there as well.

And speaking of costs, there are of course costs to the regulatory agency as well. Back in 2013, Senator Sullivan served as the Alaska Department of Natural Resources (DNR) Commissioner under Governor Parnell. During that time Commissioner Sullivan and Governor Parnell sought to get "primacy" rights for the state of Alaska to take over the job of wetlands regulation from the federal government under the Clean Water Act. The federal laws protecting wetlands would still be in place under the Clean Water Act, but the state would take over wetlands permitting issuance from the Army Corps of Engineers. The rationale was that if the state had primacy rights, they could do as good a job as the EPA and Corps in regulating wetlands, but the state could permit development projects at a much faster pace.

As DNR Commissioner Sullivan said at the time, quote, "*It's not about cutting corners, it's about making our permitting more timely, efficient and certain.*" Unquote

The problem, however, then and especially now, should the State of Alaska ever gain those primacy rights, is that the costs of assuming regulation and permitting of wetlands for the state are extremely high, and in todays' fiscal climate with our ongoing budget crisis unachievable.

I bring this up to point out that it's extremely unlikely the state of Alaska will ever gain primacy rights from the federal government over wetlands, and at the same time we still need to clarify just what bodies of water are under federal jurisdiction according to the Clean Water Act.

That's what this new Rule does. It clarifies what waters are under federal jurisdiction. And it is that clarification that does not sit well with many here today because of fears of how it could impact future development and costs to individuals and businesses.

We understand and respect those concerns, but overall the Clean Water Act has been very much a positive for our country and for our states and communities, for our fish and game and for hunters and anglers. We view this clarification and new Rule as a positive as well.

Thank you for the opportunity to testify and for your service to our country,

Mark Richards
Chairman – Alaska Backcountry Hunters & Anglers
kandik@starband.net
(907) 371-7436

Senator SULLIVAN. Thank you, Mr. Richards. Thanks for the reminder on the primacy issue. It's an important issue.

And I will add, that one of the things that we are trying to do, as I mentioned at the outset, Senator Barrasso and I had an amendment in the budget process that did try to look at the clarification that you mentioned, and I think that that's what a lot of people are focused on.

Well, listen, I want to thank the witnesses again.

What I propose to do right now, since we're all on the panel here, is I'm going to start with a few questions. We have a little bit of time. I'll direct them at individual witnesses, but I—but I do want to add that if others want to jump in, just please raise your hand. And I think that's the most efficient way to do this.

I want to—I do want to thank everybody again. As I mentioned, we're trying to bring Washington, DC to Alaska on a hearing of importance, and I think every witness here recognizes how important this issue is, not only to educate our citizens but to, for the record—and this is an official Environment and Public Works hearing in the U.S. Senate—is to get on the record some of these Alaska-unique issues that I think most of us can agree on here.

But even though we're trying to bring DC to Alaska, I do recognize that so many of you traveled very far distances just to be here, so I want to thank the witnesses again.

So let me start out with some of the questions.

Ms. Sweeney, I thought that your comment with regard to the potential conflict, with regard to ANCSA and other consultation requirements, with regard to Alaska Natives was a very insightful comment that you made during your testimony. Would you care to expand upon that at all, and also, with regard to the consultation that took place?

You know, the Federal Government does have a particularly important requirement with regard to consultation with all members of the State, the State of Alaska, but also particularly with regard to Alaska Natives.

President Kunaknana, if you could also talk about that consultation issue, if you believe you were—had the appropriate consultation in that regard.

I'd appreciate both of you commenting on that, and anyone else.

Ms. SWEENEY. Samuel, did you want to go first?

Mr. KUNAKNANA. No, quyanaqpak.

Ms. SWEENEY. Thank you, Chairman Sullivan. I appreciate the question.

The EPA, in this instance, with respect to the proposed rule, did not reach out to ASRC. And as we've gone through several different hearings on issues affecting Alaska Natives and Alaska Native corporations, the Federal Government certainly can do a better job in reaching out to consult with Alaska Native corporations. And on top of that, they're required to, whether it's through the executive orders that have been issued prescribing that consultation.

One of the issues that we find is, regardless of whether or not an Alaska Native corporation or a tribal entity agree or disagree on an issue, if there's alignment or not, it's important to get that feedback from the front end. And the way that the process is estab-

lished now, they make their decision, they draft their rule and then they go out for comment.

And it would be nice, as we move forward in this consultation era, that the Federal Government actually sit down with all aspects of the Native community, especially those that are prescribed in the executive orders that prescribe the government to do so. And they're certainly not following through in the manner in which they could.

Senator SULLIVAN. Mr. President.

Mr. KUNAKNANA. [Indiscernible.]

Senator SULLIVAN. I'm sorry?

Mr. KUNAKNANA. I will include this in writing.

Senator SULLIVAN. OK.

[Reporter requested clarification.]

Senator SULLIVAN. Yes. If you'd please turn your mic on, so she can follow what——

Mr. KUNAKNANA. I will include it in writing.

Senator SULLIVAN. OK. Great. Thank you.

Let me go to the issue of costs. I think that that is one that there are very, very significant differences of opinion on this issue. Several of us who examined the rule think that it could have enormous costs, not only in terms of money but in terms of time with regard to the issuing of additional permits.

Perhaps Mr. Rogers or Ms. Moriarty could speak to that, and others who want to address that issue. It's obviously a big issue with regard to the State of Alaska, not only in terms of, as I mentioned, the cost of doing business but the time it takes to get permits, which is, in my view, a very significant problem that we have in the State with regard to the Federal permitting, that can take literally years to get projects moving.

Mr. Rogers.

Mr. ROGERS. Thank you, Senator.

It's really an important point. I think we have enough experience under the status quo with the Clean Water Act to be able to highlight that there's a significant cost of compliance with the Clean Water Act. Expanding the jurisdiction, of course, would just exacerbate that problem.

I think you mentioned the direct cost of applying for permits, but the cost of the time, while difficult to quantify, is very significant.

Kara testified that in some cases it can take 2 years to get a Clean Water Act permit, and time equals money. That affects the delays on getting the project moving forward, to get it sanctioned. And frankly, it makes us less competitive than other jurisdictions around the world where our resources are competing in a global marketplace. And the second aspect of cost is the compensatory mitigation, and that's a current issue that's very important to us.

There have been some prior agreements. Back in 1994, there was a wetland initiative to actually acknowledge the unique circumstances in Alaska and provided far more flexibility, and we are working with other stakeholders to try to make sure that the Corps and the EPA acknowledge that existing agreement that's still in place. But irrespective, compensatory mitigation is a big cost, and of course, if you expand the jurisdiction, it gets even bigger.

Ms. MORIARTY. Senator, I think, to follow up on Rick's comments, you know, I did talk about, you know, the current cost. What I didn't say is that, you know, it does—it can take over 2—up to 2 years to obtain a 404 permit, and the average cost of each 404 permit is about $300,000. And so I don't know—I know that Kathy from the Municipal League also talked about that, you know, with her municipalities, that, you know, this isn't just resource development projects this could impact, it's also these small communities that would need a permit for their local projects, whether it be a utility project or whatnot.

But I just would like to add: It's a bit difficult, I think, to give an exact analysis, because I would argue the EPA wasn't completely transparent in the type of approach that they did use.

But I want to just give one other quote, that according to a professor at the University of California Berkeley, David Sunding—he's a professor of agricultural and resource economics—he says, "The EPA's entire analysis is fraught with uncertainty," and is not an accurate evaluation of the actual cost of implementing the rule. Furthermore, the professor stated that"The errors, omissions and lack of transparency in the EPA study are so severe that he renders it virtually meaningless."

And so this isn't just Alaskans pointing out that the economic analysis is flawed; others have, as well.

Senator SULLIVAN. Great.

Kathie.

Ms. WASSERMAN. Thank you, Mr. Chairman.

And one thing that I would like to point out is, most of Alaska's communities, the lifeblood of that community is their harbor. You can kill a community in many ways, but if you close down the harbors, I can guarantee you most of Alaska communities will not be able to thrive.

And right now, just to dredge is almost impossible and very costly and takes a lot of time. And if we now include more small waterways, with perhaps no fish, and more hoops to jump through, municipalities will not be able to keep their harbors going. And that's how you get into most of these communities.

Thank you.

Senator SULLIVAN. Ms. Simon, I wanted to kind of dig a little deeper on an issue that is very unique in many ways to Alaska, and that's not just what we're talking about with regard to costs, but the compensatory mitigation issue.

Could you provide a little bit more detail on what you were talking about in terms of our inability as a State to even be able to start meeting that, given the relatively small amount of opportunities we have for compensatory mitigation, relative to, say, other places in the Lower 48?

Ms. SIMON. It's a really difficult-to crack, Senator. Like I said in my testimony, for every one acre of disturbance, you have to mitigate that with 3 to 10 acres for preservation.

We have had a difficult time in Healy trying to identify appropriate lands or even finding an appropriate land bank to partner with. So I would say that in Alaska, the land bank system isn't as sophisticated as it is in other areas, and certainly the opportunities for lands to select is also uncertain. But definitely with this pro-

posed rule it really makes it near impossible for Alaskans to adhere with compensatory mitigation, because so many of our wetlands are already under public management and unavailable for selection. So it takes a very difficult situation and makes it much worse.

Senator SULLIVAN. Thank you. Mr. Richards, do you have any—as you were talking—and I appreciate, again, your testimony. Do you have any suggestions on ways in which the rule could be clarified, or do you think that in its current form it provides the clarification that's needed?

There's a lot of people who, in a lot of States, who think that it actually doesn't do that, but I appreciate your constructive comments about looking at ways to try and do that.

You may have seen, as I mentioned, the amendment we put forward that was passed as part of the Senate budget process last week that tried to do that. Do you have any other suggestions that way?

Mr. RICHARDS. Senator, thank you.

The main suggestion I would have is that this has become overly polarized, just like our Country is right now, and so—you mentioned in your opening comments about hyperbole. And well, one of the comments Ms. Simon made was that this new rule would likely stop all development projects, and that's not true. So I think we need to—I think we need to get on the page where we can all come to a consensus, like what it would do and what it wouldn't. What I'm hearing, from a lot of the opposition here, is a lot of coulds: "It could do this."

So clarification, yes, would be needed, should be needed, especially for the State of Alaska. But I would like to see your office work on this in a bipartisan manner to, instead of kicking this back to start over, to let's look at what the new rule is and look at the concerns we have and look at trying to work with Barrasso and others in trying to, you know, come up with a fix.

Senator SULLIVAN. OK. Good suggestion.

I do think, though, that—you mentioned hyperbole, but even Obama administration's—some of their own agencies have resorted to——

Mr. RICHARDS. We don't disagree with that.

Senator SULLIVAN [continuing]. Concerns.

And let me give you one example, and then I do want to just mention this to all the panelists here, the issue of small businesses, the issue of small communities. As Ms. Moriarty mentioned, you know, an EPA 404 permit can cost on average $300,000 and take 2 years.

Interestingly enough, when this rule came out, the EPA and Corps certified that the proposed rule will not have significant economic impacts on a substantial number of small entities, small communities, small businesses, which lead to the chief counsel for the Small Business Administration Office of Advocacy, that they determined that this statement by the EPA and Corps was in error and improper, and the comments that they filed, this office of the SBA in the Obama administration stated advocacy in small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small busi-

nesses. The limited economic analysis, which the agencies submitted with the rule, provides ample evidence of a potentially significant economic impact.

Advocacy at the SBA advises the agencies to withdraw the rule and conduct an SBRA panel prior to promulgating any further rule on this issue.

So, even within the Obama administration, there are concerns, significant concerns, that we have not undertaken the proper analysis on how this will impact small communities and small businesses.

And I would like to just open that up for any concerns. You know, most of our employers in this—in our great State are small businesses. And any of the witnesses care to comment on that?

Rick, I know that you represent literally hundreds of small businesses.

Mr. ROGERS. Yes. Senator, that's really a good point. You know, we think about our big projects. We heard testimony from Alyeska and from the oil and gas industry. But the Clean Water Act has such a broad jurisdiction, of course it affects everything from a community project to small construction jobs. So clearly it's not just about larger organizations, it affects every aspect.

And like I mentioned in my testimony, Senator, the ubiquitous nature of wetlands and the fact that they're so widespread in Alaska, and particularly under the proposed rule, it's really hard to find an activity that does not require a 404 permit; if you're doing any filling, any dredging, if you're building a road, driveways, culverts.

And so I think you're correct in probing that issue, because small business, both here in Alaska and nationwide, is, you know, a significant job creator and a significant, you know, important aspect of our economy.

Senator SULLIVAN. Thank you.

Any other comment?

Kathie.

Ms. WASSERMAN. I did a little research on this, Senator, and under the SISNOSE Act—and someone obviously gave it an acronym but then went no further to pay attention to it—if a community or an organization is a small entity, which of all 164 municipalities, that includes 160 of them, they're supposed to do a—they're supposed to provide a factual basis to determine the rule does not impact these small entities. And under the proposed ruling that was never done. I know no municipalities were ever contacted as a small entity, and I have not heard of any businesses that were.

Ms. MORIARTY. And, Senator, if I could just add one more comment. I do represent the oil and gas industry, and we might not be viewed as a small business in Alaska, but we do—are the heartbeat of the economy, I would argue, with one-third of all Alaska jobs can be attributed to our industry. And $300,000 here and $500,000 there may not sound like a lot, but we're—the State's not the only one suffering a financial situation at 50-dollar oil.

And mineral prices change and oil prices change. It's a tough—it's a tough environment to do business. And I think the main problem with this rule is that it is going to have such an impact on Alaska but Alaska isn't really considered.

And I think when you think about specific things that can be done without starting over, if starting over isn't an option, we need to consider how does this impact Alaska.

Senator SULLIVAN. I think that's a great comment.

One of the—you know, there's obviously very differing views here on the impact of the rule, the importance of the rule, whether you support or don't support the rule. I do think—and I don't want to speak for all the witnesses, though—there certainly seems to be broad consensus that this rule has not done much to consider the unique circumstances of Alaska, particularly given what a large swath of the Clean Water Act jurisdiction we're already under. And I think that that, certainly to me, is one of the takeaways. I don't know if there's a consensus on that throughout.

But let me ask another question, for Mr. Litmans and Mr. Troll.

There seems to be, again, kind of a differing view on how this could expand the jurisdiction of the EPA's wetlands authority in the State and throughout the Country.

Mr. Litmans, you mentioned "didn't at all, just clarified it." Even the EPA admits to an expansion of about 3 percent, which 3 percent in Alaska would be a pretty big expansion.

And I don't want to put words in your mouth, Mr. Troll, but you seemed to, through your testimony, also indicate that you thought it would expand the jurisdiction of the Clean Water Act by getting into areas that weren't previously covered.

Do you want to comment on that? Do you think that this rule expands the jurisdiction of the Clean Water Act by the EPA?

Mr. TROLL. Well, Senator, mostly I just wanted to testify to the fact of actually what I've seen and is of concern, as I understand it, about ephemeral streams and intermittent streams. And certainly our observations, in this extensive work at the headwaters of the Nushagak, and now of the Kvichak, as well, it's not uncommon to find ephemeral streams and pockets of water above them that do hold rearing salmon and other species of fish. You know, we found cohos that hold over for a year or two, just waiting for the water to come back. And so we want to make sure, at least from the standpoint of, you know, all the downstream effects on commercial fishing and subsistence fishing, that those kinds of areas are protected.

Senator SULLIVAN. But do you think that it expands the jurisdiction as presently understood by the law right now?

Mr. TROLL. I'll have to defer to Mr. Litmans on that. But certainly, if they are not, they should be. And there may be some question as to whether it's an expansion or just a clarification that these systems already do exist, or are already covered by the Clean Water Act.

Senator SULLIVAN. OK. Mr. Litmans.

Mr. LITMANS. Thank you, Senator Sullivan.

I stand by my testimony that the proposed rule does not expand jurisdiction for the Army Corps of Engineers by defining "waters of the United States" as they have.

Again, the rule is borne out of Rapanos, Bayview, SWANCC. Bayview established that adjacent waters are jurisdictional. That was a decision where there was no question by the Supreme Court

about whether or not jurisdictional waters extend beyond the traditional navigable, in fact, waters of the United States.

Justice Scalia said they did, in fact, stretch beyond traditional navigable waters, in fact, and would include adjacent waters because adjacent waters have the ability to impact waters of the United States. They have the ability to impact the chemical, biological and physical integrity of our Nation's waters, and they're therefore rightly regulated under the Clean Water Act.

The bigger issue with respect to jurisdiction was established in Rapanos. And there we have a split decision with four justices—a 4–4–1 decision by the U.S. Supreme Court, which is incredibly unusual.

The most important thing is that we're discussing today the impacts to Alaska. Well, the test for determining jurisdiction in Alaska will be controlled by the Ninth Circuit, and the Ninth Circuit has adopted Justice Kennedy's test, the significant nexus test. That test is the same test that EPA has now codified. The only difference post rulemaking, should this rule be adopted, is that that significant nexus test will be codified.

Currently, the law of the land is that, if there is a significant nexus, that those waters are jurisdictional. Because the test is the same for purposes of determining whether or not one must get a 404 permit, there's no change in circumstances. If there is a significant nexus, then one must get a 404 permit.

With respect to the 3 percent expansion, this comes from EPA's March 2014 economic analysis of proposed revisions to the definition of "waters of the United States." What EPA and the Corps tried to do in that report is assess what the impacts are under the new test. And when you look at the 3 percent, it's actually a 2.7 percent increase of jurisdictional waters. It was 2.7 percent based on an analysis of some 290 permitted actions between 2009 and 2010.

And those—what the Corps did is they went back and they said: Under the proposed rule, what would—what would the world look like? And it looks very similar if there's a 2.7 percent change. And the EPA noted: Well, where does that 2.7 percent change come from? It comes from largely the result of clarifying current confusion and assessing—over the difficulty of assessing "other waters."

There is the potential—when assessing significant nexus, we are talking about hydrology, we are talking about science, we are talking about impacts to waters of the United States. Is there significant impact to the downstream waters? There is the potential that you could have scientists look at this and have a differing opinion.

So the 2.7 percent, there's a small margin of error between pre and post rule. And I would say, because the significant nexus test is the law of the land in the Ninth Circuit, it is what EPA adopted, that there is no expansion.

Senator SULLIVAN. Would you like to respond, Ms. Sweeney?

Ms. SWEENEY. Thank you, Chairman Sullivan.

I would like to just hit on the significant nexus test. While I respect your opinion, I disagree with my fellow witness here.

With respect to Alaska, especially on the North Slope, there is a major disconnect or potential overreach in the proposed rule because it provides the Federal Government a workaround against

the significant nexus test if wetlands on top of permafrost are characterized as riparian areas adjacent to jurisdictional waters.

The Congressional Research Service, in their report on page 3 and 4, they acknowledge that the proposed rule expands Federal jurisdiction through the inclusion of all waters that are adjacent to—and they list the five different areas: Waters susceptible to interstate commerce; all interstate waters including interstate wetlands; territorial seas; impoundment of the above waters, or tributary. And tributaries of the above waters is a broadly defined term in the proposed rule.

When you look at the decision in Rapanos v. United States, Justice Kennedy's concurring opinion concluded that wetlands were only waters of the U.S. if those wetlands had a significant nexus test to navigable waters. The proposed rule prescribes that a significant nexus test will only be performed in cases of waters categorized as "other waters."

If wetlands on top of permafrost are categorically determined to be riparian areas, then no test is needed. And according to the proposed rule there is no significant analysis required, thus placing those wetlands predominant to the North Slope as "waters of the U.S."

It's important to note that the definition of the "riparian area" in the proposed rule and the language that Fish and Wildlife use to define wetlands in Alaska are very, very similar. So I would jurisdiction disagree with the notion that it does not expand jurisdiction of the Clean Water Act in Alaska specific to the North Slope.

Senator SULLIVAN. I'd like to just make a broader comment with regard to this discussion, because I think it's a critically important one.

You know, one of the concerns I certainly have as Alaska's Senator, but I think a lot of Alaskans have, is what's happening with regard to Federal overreach that kind of goes in a little bit of a rhythm that we've seen with this Administration, in a whole host of areas, where they try to do something through the Congress, they can't get it done because it's not popular, they can't get it through the Congress, so they take action or direct action through Federal agencies to do it anyway. And I think Alaskans have seen this. I've certainly seen this in our State, across a whole host of areas, and I think this is one that certainly looks to fit that pattern.

So, in March 2009, the EPA, in the new Obama administration, wrote the Congress to try to look at ways to maybe clarify, maybe expand the jurisdiction of the Clean Water Act. A couple Members of Congress introduced bills to do so. Those bills went nowhere.

In the interim, the Supreme Court reprimanded the EPA for taking regulatory action that was in the realm of the powers of the Congress, and yet, many view this rule as doing the exact same thing.

So let me ask, Mr. Litmans, if this is an expansion of the Clean Water Act, if it's an expansion, which a lot of people believe—and Ms. Sweeney, I think, did a good job of laying out why, including the Congressional Research Service, that this is an expansion—isn't that, under the separation of powers of the United States, in the Supreme Court's ruling in Utility Air Regulator Group, in

which the State of Alaska played an important role, isn't that the realm for Congress to make the decision on whether the Clean Water Act should be expanded, not the realm of an agency? Which does have the role, and I admit it, to clarify the law, but certainly not to write the law or expand the law, which would be a violation of the separation of powers.

Mr. LITMANS. The proposed rule does not expand jurisdiction.

Senator SULLIVAN. No. But if it did, wouldn't that be the realm of Congress and not the EPA?

Mr. LITMANS. The——

Senator SULLIVAN. Just simple question, simple answer.

Mr. LITMANS. I can't give a simple answer. It depends on how—on what the agencies have done with respect to defining a particular term from a statute. The statute, the Clean Water Act, the regulatory ability to regulate discharges and fill is governed by the Congress. And so if you have a Congress-based question, I don't have enough facts to answer your question, sir.

Senator SULLIVAN. OK. Thank you.

Let me ask a final question with regard to consultation. And as I mentioned, particularly with regard to Alaska, do any of the witnesses believe that there was extensive consultation on this issue, given the groups that you represent? Whether it's tribes, whether it's small communities, whether it's agency or organizations that represent different private sector entities, was there extensive consultation with regard to this rule, particularly how it applies to our unique Alaska circumstances?

Ms. SIMON. No.

Ms. WASSERMAN. No.

Ms. MORIARTY. No, Senator.

Mr. ROGERS. No. And several of us commented on the connectivity rule, Senator, which was of course out for public comment before they initiated this rule and it was in draft format. There were great concerns over that report, particularly how it failed to recognize things like permafrost and unique Alaska conditions, and yet, the EPA just marched forward with this rulemaking and kind of after the fact made amendments to that connectivity report; and yet, it still is really void of very thoughtful Alaskan-specific analysis.

Senator SULLIVAN. Mr. President, do you have any views on it?

Mr. KUNAKNANA. [Indication in the negative.]

Senator SULLIVAN. Mr. Troll.

Mr. TROLL. NO.

Senator SULLIVAN. Mr. Litmans.

Mr. LITMANS. I stand by my previous testimony.

Senator SULLIVAN. OK. Well, listen, I want to thank everybody again. I know we've run over, a little bit of time. I really appreciate the great testimony here. The differing views are important views. We will certainly be taking these back to Washington. But more importantly, we're going to continue to try to have these kind of field hearings, so we're coming to you, to your communities.

We're going to conduct another hearing on the proposed "Waters of the U.S." in Fairbanks on Wednesday. And we just appreciate the time, the concern, and we look forward to a continuing discussion. Which for Alaska is a very important regulation, a very im-

portant rule, that as you have seen from some of the witness testimony, a lot of the witness testimony, there's very big concerns, bipartisan concerns, in the U.S. Congress, and I would certainly say bipartisan concerns among the vast majority of the States in the United States about this proposed rule.

So I want to thank the witnesses again, and the hearing is now adjourned.

Thank you.

[Whereupon, at 12:22 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows:]

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Governor Sean Parnell
STATE OF ALASKA

November 14, 2014

The Honorable Gina McCarthy
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The Honorable John M. McHugh
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Re: State of Alaska's Comments in Response to the Proposed Rule Defining "Waters of the United States" Under the Clean Water Act; **Docket # EPA–HQ–OW–2011–0880**

Dear Administrator McCarthy and Secretary McHugh,

Enclosed are the State of Alaska's comments in response to the Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rule attempting to define the scope of federal jurisdiction under the Clean Water Act. The proposed rule would significantly expand federal jurisdiction under the Act, unlawfully subjecting nearly all waters and wetlands in Alaska and across the nation to regulation by the EPA and the Corps.

The proposed rule will not only federalize land use decisions for State, local, and private lands, it will, under threat of steep civil and criminal penalties, force owners or developers of these lands to pay to use them through costly mitigation requirements. The escalating costs of mitigation demanded by the federal agencies are spiraling out of control, hampering important development in both the public and private sectors. Moreover, EPA and the Corps have not meaningfully consulted with the states on a matter which implicates significant infringement on states' rights and responsibilities in matters of land and water resource management and use.

The State of Alaska, like many others, asks that you withdraw the proposed rule.

Sincerely,

Sean Parnell
Governor

cc: The Honorable Lisa Murkowski, United States Senate
The Honorable Mark Begich, United States Senate
The Honorable Don Young, United States House of Representatives
Jo Ellen Darcy, Assistant Secretary of the Army (Civil Works)
Ken Kopocis, Deputy Assistant Administrator, Office of Water, Environmental Protection Agency
Kip Knudson, Director of State and Federal Relations, Office of the Governor

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November 14, 2014

Via Email & Certified First Class Mail

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Re: State of Alaska's Comments in Response to the Proposed Rule Defining "Waters of the United States" Under the Clean Water Act; **Docket # EPA–HQ–OW–2011–0880**

Dear Administrator McCarthy and Secretary McHugh:

On behalf of the State of Alaska (State), we submit the following comments on the proposed rule for the Definition of "Waters of the United States" under the Clean Water Act, (Docket No. EPA-HQ-OW-2011-0880), publicly noticed by the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) on April 21, 2013 (79 Fed. Reg. 22,188).[1] The State believes that the proposed rule unlawfully expands federal authority under the Clean Water Act (CWA). Congress specifically recognizes, preserves, and protects under

[1] The State has also joined in supporting other comments on the proposed rule, including an October 8, 2014 letter signed by the attorneys general and governors of several states, including Alaska Attorney General Michael Geraghty. Other states joining on the letter were West Virginia, Nebraska, Oklahoma, Alabama, Georgia, Kansas, Louisiana, North Dakota, South Carolina, South Dakota, Iowa, Mississippi, Nebraska, and North Carolina. The October 8 letter sets forth in detail many legal and procedural concerns regarding EPA and the Corps' development of the proposed rule. Those comments are expressly incorporated herein by reference. Further, the State's comments are applicable to all aspects of the proposed rule, both the preamble and the 11 sections of the Code of Federal Regulations (CFRs) that are proposed for revision.

Section 101(b)[2] of the act, the "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" within their respective state borders. Notwithstanding, under the proposed rule, EPA and the Corps seek to sweep up essentially all waters and wetlands under CWA jurisdiction, except in very limited circumstances, infringing on states' land and water management rights and responsibilities. As described below, if the proposed rule is finalized, it will lead to severe regulatory and economic consequences. The State also believes there are critical flaws with the economic analysis and the scientific and technical rationales upon which EPA and the Corps rely for the proposed rule.

Alaska's unique circumstances compel it to press for clarity on the question of what waters (including wetlands) are subject to CWA requirements. Alaska has more coastline than the entire conterminous United States, over three million lakes greater than five acres in size, and over 15,000 water bodies that are known to support resident or anadromous fish.[3] At least one inventory estimates that Alaska has over 174 million acres of wetlands, more wetlands than all other states combined. These wetlands comprise approximately 43 percent of the surface area of the State.[4] While not all of these waters are jurisdictional under the CWA, Alaska has long protected these important resources under several statutory and regulatory authorities.

EPA and the Corps appear to assume waters, no matter how attenuated their connection is to downstream traditionally navigable waters, will have no protection. This is incorrect and disregards the regulatory role of the states. In Alaska, our laws prohibit all discharges to lands or waters of the state, unless permitted. We do not have to make a determination whether a land or water is under State jurisdiction and so avoid the problems associated with federal CWA jurisdictional determinations.

Thus, for years the State has advocated for a collaborative rulemaking on the issue of CWA jurisdiction, and appreciates that the federal agencies are undertaking formal rulemaking rather than guidance for this important matter. However, the State joins with several other commenters in asking EPA and the Corps to withdraw the currently proposed rule, as it is devoid of any meaningful consultation and input from the states. Moreover, the so-called "Connectivity Report" that EPA and the Corps developed to support the proposed rule was neither finalized nor peer reviewed before the proposed rule was developed and published. The report is also biased toward justifying the rulemaking, rather than approaching the jurisdictional question from an objective position, and likewise was developed without consultation with the states.[5] Further, rather than recognizing that the CWA places limitations on jurisdiction under the act, EPA is misconstruing the act and Supreme Court precedent to significantly expand CWA jurisdiction, violating the limits of Congress'

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[2] 33 U.S.C. 1251(b).

[3] Alaska Department of Fish and Game, *Catalog of Waters Important for the Spawning, Rearing or Migration of Anadromous Fishes*, available at: http://www.adfg.alaska.gov/sf/SARR/AWC/index.cfm?ADFG=main.overview.

[4] *Id.*

[5] The State, knowing that the federal agencies were going to heavily rely on the report to support the rule and also concerned about inadequacies with the report, sent a representative to testify on the report at the SAB proceedings in Washington, D.C., as well as submitted detailed written comments on the draft report.

Commerce Clause authority. A rulemaking such as this must comply with constitutional, statutory, procedural, and technical requirements and be conducted in an open and transparent process, not in a rushed manner where only federal regulators and members of academia steer the results.

The State's comments probe a wide range of issues raised by the proposed rule, including the following:

- **Impermissible Expansion of Jurisdiction.** The proposed rule would expand federal jurisdiction over large areas of Alaska, contrary to the CWA and Supreme Court precedent. Rather than tying jurisdiction to navigable waters, as Congress intended and as the Commerce Clause supports for assertion of federal authority, EPA and the Corps focus instead on connections, regardless of significance, to unreasonably construe Justice Kennedy's "significant nexus test" in such a way as to eliminate the navigability requirement for jurisdiction in its entirety from the CWA. In short, EPA and the Corps' recasting of the significant nexus test to sweep up nearly all waters and wetlands in the United States vitiates the fundamental prerequisite for federal jurisdiction under the CWA – a water's navigability.
- **Failure to Consult with States.** In contravention of federalism principles, CWA requirements, and Executive Order 13132, EPA and the Corps failed to embark on meaningful consultation with states in the promulgation of the proposed rule.
- **Increased Uncertainty.** The rulemaking, rather than clarifying jurisdiction, creates uncertainty, by introducing new terms and new definitions that only add confusion to implementation of the CWA, especially since the rule is intended to create jurisdiction across the entire act, not just Section 404. Indeed, the expansive "catch all" contemplated by the term "other waters" creates so much uncertainty about what waters are covered and what are not, no landowner would venture – at the risk of federal enforcement action or third party suit – to develop his or her property without first obtaining a jurisdictional determination, even though federal jurisdiction under the CWA is limited.
- **Muddled Process and Failure to comply with the Administrative Procedure Act (APA).** The proposed rule is based on the Connectivity Report, which was developed without consultation with state, local, or tribal governments, or industry. The report has not been completed, and lacks regional examples, including for Alaska. Yet, EPA has inexplicably pressed forward with its rulemaking. The rulemaking must be founded on a reasonable schedule, explore all potential consequences to the federal and state agencies, as well as the regulated community.
- **Failure to Afford Due Process.** The proposed rule provides no mechanism for judicially challenging affirmative jurisdictional determinations before other CWA requirements are imposed. *Any* rulemaking on the jurisdictional issue must allow regulated entities and states the opportunity to administratively and judicially challenge an affirmative jurisdictional determination *before* other CWA requirements are imposed. In light of the expensive, time-consuming and punitive consequences flowing from affirmative jurisdictional determinations, the rulemaking must – based on principles of due process and to avoid infringing upon states' regulatory authorities – allow jurisdictional determinations to be challenged.
- **Failure to Include State Regulatory Experts on Science Advisory Board (SAB) Peer Review Panel.** The peer review panel convened by the SAB to review the draft Connectivity Report was made up entirely of representatives from academia, creating a built-in bias toward expansive federal jurisdiction with limited relevance to a regulatory solution.
- **Disregard and Underestimation of Significant Economic Costs.** Economic analysis for the proposed rule does not adequately consider the significant cost of implementing the proposed rule. Costs to

comply with the rule divert funding from state and federal regulatory programs already in place, and place an unreasonable burden on private and public development projects for which there is little risk of impacting downstream, traditionally navigable waters. Increases in compliance and transactions costs include consulting contracts, compensatory mitigation, post-construction costs, and liabilities that are foreseeable. EPA and the Corps fail to adequately investigate and disclose what fiscal impacts implementation of this program will have on both state and federal agencies. The rule is an unfunded mandate in terms of its implementation, both for state regulatory agencies, state-funded public construction projects, and for the court system.

- **Increased Potential for Citizen Suits.** Because the proposed rule would sweep up nearly all waters and wetlands located throughout the United States under a variety of CWA provisions, not just the Section 404 program, it is likely to lead to a significant increase in citizen suits against the federal agencies, states, and public and private entities. EPA and the Corps fail to address this potential. If anything about the rule is certain, it is that it will result in an enormous proliferation of citizen suits, facilitating litigation that will likely be driven in large part by political agendas, rather than supported by any credible science.

I. Legal & Procedural Issues

A. Although federal jurisdiction under the CWA is limited, EPA and the Corps seek to impose expansive jurisdiction through the proposed rule.

With the proposed rulemaking, EPA and the Corps start from the premise that there is broad federal jurisdiction under the CWA, that the majority of waters and wetlands in the United States qualify as "waters of the U.S.," waters which would, in turn, be subject to CWA regulatory requirements, including Section 402 and 404 permitting requirements. The proposed rule assumes expansive jurisdiction by declaring most waterbodies and wetlands are jurisdictional. At the same time, the rule creates uncertainty through the proposed definitions of three key terms because landowners will wonder whether they can ever seek to develop or use their property without obtaining a jurisdictional determination.

First, except for limited exceptions, the term "tributary" requires only three criteria (bed, bank, and ordinary high water mark (OHWM) to qualify as a water of the U.S., including any flow, all natural or manmade features (e.g., ditches and culverts), and wetlands, lakes and ponds. Second, the term "adjacent," which heretofore has been applicable only to wetlands, will now include non-wetlands found in vaguely defined "riparian areas" and "floodplains," and relies on such new concepts as "shallow subsurface hydrologic connections" to assert jurisdiction over water features. Third, the new term "other waters" serves as a catchall, which also allows aggregation of similarly situated waters within a watershed. Thus, from a starting premise, the rule presumes far-reaching, rather than limited, federal jurisdiction. It also is unclear which waters would remain under the State's sole regulatory control.

However, closer examination of both the CWA and relevant Supreme Court case law reveal that there are important side bars on the extent of federal jurisdiction and the waters covered by the act. As noted at the

outset of this letter, under Section 101(b), as well as Section 510,[6] of the act, Congress intended for states to retain the primary rights and responsibilities for land and water uses within their boundaries, including the application of measures to minimize environmental impacts from any uses. Moreover, as both Congress intended and the Supreme Court has held, a key aspect of federal jurisdiction rests on the navigability of covered waters, because a water's navigability supports Congress' assertion of commerce clause authority over "waters of the U.S."[7] Non-navigable tributaries directly flowing into navigable waters may also be covered, and wetlands immediately abutting navigable waters may also be jurisdictional.[8] However, the Supreme Court has also twice held that there are limits to federal authority, that a water's navigability is still a key factor, and that waters and wetlands more remotely removed from traditionally navigable waters or which have insignificant impact on down-stream waters are not jurisdictional, even if they are connected or there may be some seasonal flow.

In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*,[9] the Supreme Court considered whether the Corps could assert jurisdiction over dredge and fill activities impacting isolated ponds, by virtue of the Corps' so-called Migratory Bird Rule, because migratory birds occasionally used those waters as habitat. The Court found the Corps' assertion of jurisdiction exceeded its authority, because navigable waters did not include "nonnavigable, isolated intrastate waters" such as the seasonal ponds at stake in the case.[10]

Key conclusions reached by the Court in *SWANCC* rested on the doctrine that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended such a result." The Court stated this was particularly a concern in *SWANCC* because unbounded assertion of jurisdiction "altered the federal-state framework by permitting federal encroachment upon a traditional state power."[11] By extending the Corps' jurisdiction to isolated ponds, the Corps' action raised "significant constitutional questions" regarding Congress' constitutional authority, and yet there was no clear statement by Congress that it sought to assert such broad authority.[12] Indeed, Congress expressed an intent to limit such authority, by recognizing, preserving, and protecting for the states their respective traditional authorities.[13]

Later, in *Rapanos v. United States*,[14] a case focusing on whether federal jurisdiction over several wetlands adjacent to non-navigable tributaries was appropriate, the Supreme Court, through separate opinions, announced two tests for determining whether federal jurisdiction was appropriate. Justice Scalia, writing for four justices in the plurality opinion, held that waters of the U.S. are only those that are "relatively permanent,

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[6] 33 U.S.C. § 1370.
[7] 33 U.S.C. § 1344 and § 1362(7).
[8] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).
[9] 531 U.S. 159 (2001).
[10] *Id.* at 171.
[11] *Id.* at 172.
[12] *Id.*
[13] *Id.*
[14] 547 U.S. 715 (2006).

standing or continuously flowing bodies of water" and secondary waters, which have a "continuous surface connection" to relatively permanent waters.[15] "Wetlands with only an intermittent, physically remote hydrological connection to 'waters of the United States'...lack the necessary connection to covered waters."[16]

Justice Kennedy, while holding with the majority that federal jurisdiction under the CWA was limited, found that jurisdiction should be based on a "significant nexus," that jurisdiction is only appropriate over "waters that are navigable in fact or that could reasonably be made so," or secondary waters that have a significant nexus to in-fact navigable waters.[17] Under this test, Justice Kennedy (writing only for himself) stated that a significant nexus exists only where the wetlands, "alone or in combination with similarly situated lands in the region," "significantly affected the chemical, physical, ***and*** biological integrity of other covered waters understood as navigable in the traditional sense."[18] Justice Kennedy rejected the federal assertion of broad authority because it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial" to a traditionally navigable water.[19]

EPA and the Corps acknowledge[20] that *SWANCC* and *Rapanos* reduce the historic scope of jurisdiction that the federal agencies previously asserted under the CWA. However, instead of recognizing the foregoing limits on federal authority, through their rulemaking, EPA and the Corps construe the most expansive, essentially boundless interpretation of federal jurisdictional authority possible, even beyond what they historically sought to assert.

B. EPA and the Corps have failed to adequately consult with the States in developing a proposed rule.

Contrary to Congress' CWA directive that EPA and the Corps consult and cooperate with the States in developing programs and comprehensive solutions to protect the nation's waters and to preserve the states' primary role in land and water resource management,[21] there has been no meaningful consultation with the states, certainly not with Alaska, in the development of the proposed rule. Writing such a fundamental rule that applies nationally is a very difficult task, and state regulators would bring valuable insight to promulgating a rule, given their regulatory authorities and knowledge of specific watersheds and state geomorphologic and hydrologic conditions. With this proposed rule, EPA and the Corps unilaterally acted to outline what they see as the bounds of their authority, without any consultation with the states on where it is appropriate to draw those lines. This is particularly disconcerting for the states, as Congress, in enacting the CWA, provided that the states should retain primary jurisdictional authority over state lands and water resources.

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[15] *Id.* at 739-42.
[16] *Id.* at 742.
[17] *Id.* at 779.
[18] *Id.* at 780 (emphasis added).
[19] *Id.*
[20] *See, e.g., EPA Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of "Waters of the United States,* at 13.
[21] *See, e.g.*, 33 U.S.C. § 1251(b) and (g), and 33 U.S.C. § 1252(a).

Additionally, EPA and the Corps fail to comply with EO 13132, which requires consultation on rulemakings that have federalism implications and which will have "substantial direct effects on the States."[22] Efforts to clarify the term "waters of the United States" clearly raise significant federalism issues. Consultation under the EO is further required in light of several other provisions, including the following:

- Section 2(i): "The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State and local governments have identified uncertainties regarding the constitutional or statutory authority of the national government."
- Section 3(b): "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means."

Thus, a procedural component of the larger 404 – and indeed, 402 – permitting regime like that in the proposed rule for determining jurisdictional lines implicates the substantial rights of the states, both from a Tenth Amendment Constitutional, as well as a CWA statutory perspective. Including the states with all other stakeholders and interested parties in the opportunity for public comment on a proposed rule is decidedly not the robust and meaningfully state-federal "consult and cooperate" partnership that Congress clearly had in mind when it enacted the CWA. Nor do a handful of teleconferences where EPA is only there to present its proposal and to answer questions, rather than collaborate on rulemaking, satisfy the consultation requirement.

Under the CWA, Congress mandated that the "[f]ederal agencies ***shall*** co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."[23] Further, "[i]t is the policy of the Congress to recognize, preserve, and protect ***the primary responsibilities and rights of the State to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter***."[24] Equally important, under the act, EPA's Administrator

> ...shall, ***after careful investigation, and in cooperation with*** other Federal agencies, ***State water pollution control agencies***, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.[25]

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[22] Executive Order 13132, Section 1(a), Federalism (August 4, 1999).
[23] 33 U.S.C. § 1251(g) (emphasis added). Congress also stated that "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act," and that nothing in the act "shall be construed to supersede or abrogate rights to quantities of water which have been established by the State." *Id.*
[24] 33 U.S.C. § 1251(b) (emphasis added).
[25] 33 U.S.C. § 1252(a) (emphases added).

The CWA also provides that EPA's "Administrator shall establish national programs for the prevention, reduction and elimination of pollution and as part of such programs shall [cooperate] with the other federal, state, and local agencies."[26]

Notwithstanding these important CWA mandates, there was no consultation or cooperation with state co-regulators on the development of this lengthy, complex, and important rule. Rather, the EPA and Corps have promulgated a proposed rule that incorporates an expansive view of federal jurisdiction, under cover of Justice Kennedy's "significant nexus" test, notwithstanding the sidebars clearly imposed on expansive interpretations by CWA provisions, Supreme Court precedent, and even Justice Kennedy's stand-alone decision in *Rapanos*. Significantly more waters and wetlands will automatically be determined jurisdictional rather than based on any significant "nexus" to a down-stream traditional navigable water, even though the Supreme Court has stated that federal jurisdiction under the CWA is not without limits.

As Justice Kennedy stated in *Rapanos*, the deference owed to regulations does not extend so far as to recognize CWA jurisdiction "whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that may eventually flow into traditional navigable waters."[27] Justice Kennedy's view directly refutes the agencies' conclusion in the rulemaking that "[t]ributaries that are small, flow infrequently, or are a substantial distance from the nearest [traditional navigable water] (e.g., headwater perennial, intermittent, and ephemeral tributaries) are essential components of the tributary network."[28]

The plurality also opined that federal jurisdiction was not without limitation. The proposed rule refers to *SWANCC* and *Rapanos*, but it does not adequately describe how the rule complies with the more limited scope of jurisdiction over headwaters, tributaries, isolated waters and wetlands that is contemplated in these decisions. The proposed rule is lacking in its primary objective because it does not inform field staff or the public what the limits of federal jurisdiction are for the wetlands and waters that were under consideration by the Supreme Court in *Rapanos*.

In addition to the concerns and lack of clarity surrounding terminology and concepts in the proposed rule, one of the key concerns is whether this rule will encroach on the states' traditional role[29] to manage state lands and water resources. In *Rapanos*, Justice Scalia recognized the danger of potential federal intrusion on traditional state regulation of land use in too expansive a view of CWA terminology:

> Even if the phrase "the water of the United States" were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible. As we noted in *SWANCC*, the Government's expansive interpretation would "result in a significant impingement of the State's traditional and primary power over land and water use." Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. The extensive federal jurisdiction urged by the Government would authorize the Corps to function as

[26] 33 U.S.C. § 1254(a)(1).
[27] *Rapanos*, 547 U.S. at 778-79.
[28] 79 Fed. Reg. at 22,206.
[29] 33 U.S.C. § 1251(b).

> a *de facto* regulator of immense stretches of intrastate land - an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. We ordinarily expect a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase "the waters of the United States" hardly qualifies.[30]

As a practical matter, because so many waters (including wetlands) will be jurisdictional under the proposed rule, and because only two states have assumed the Section 404 permitting program, the rule confers upon the Corps and EPA expansive control over land use and economic development decisions traditionally reserved for state and local governments. All activities that will potentially affect newly jurisdictional waters will need to be approved by the Corps, and will be subject to EPA veto. Thus, it is misleading for EPA and the Corps to state, as they have repeatedly done so, that they only regulate waters of the U.S.

Alaska already has in place many statutes and regulations for preserving and protecting isolated waters and wetlands within its State boundaries that may be affected by development.[31] The law covers liquid and solid waste discharged to lands and waters of the State, and the State does not have to determine State jurisdiction. The proposed rule exacerbates the already expansive existing 2008 guidance,[32] and would compound federal intrusion on and displacement of Alaska's management of its lands and waters. Notwithstanding the State's earlier stated position that rather than implementing the 2008 guidance a rulemaking was required, the federal agencies fail to justify why that 2008 guidance, issued in response to *SWANCC* and *Rapanos,* should ***now*** be replaced by new regulations that expand jurisdiction even further, for all CWA requirements, not just those in Section 404.

Neither EPA nor the Corps contacted Alaska to consult with the State in the development of the proposed rule. The failure to meaningfully consult is contrary to case law examining similar state-federal consultation provisions. For example, in *California Wilderness v. U.S. Department of Energy (DOE)*,[33] the Ninth Circuit Court of Appeals considered whether DOE had properly consulted with the states when it issued an order that formally designated two national interest electric transmission corridors under the Energy Policy Act of 2005.[34] DOE's order rested on a Congestion Study that it had conducted, prepared, and noticed for comment.[35]

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[30] 547 U.S. at 737-38 (citations omitted).

[31] *See, e.g.*, 33 U.S.C. § 1341 (CWA Section 401 certification authority); AS 46.03.100 (wastewater discharge permitting authority); 18 AAC 70 (Alaska water quality standards); 18 AAC 72 (wastewater disposal); and 18 AAC 83 (Alaska Pollutant Discharge Elimination System Program).

[32] Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, (EPA and Corps' 2008 Guidance), found at the following link: http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf

[33] 631 F.3d 1072, 1095 (9th Cir. 2011).

[34] *Id.* at 1080.

[35] *Id.* at 1080-82.

As the Ninth Circuit noted, DOE defended its action "by stating that it reached out to affected States through meetings with the National Association of Regulatory Utility Commissioners…and through other meetings and correspondence with individual State entities."[36] The Ninth Circuit held that Congress statutorily mandated consultation, that DOE's notice and comment proceedings and other sparse conferences with the states did not suffice as substitution for the mandated state-federal consultation process, and that the failure to consult with states was not harmless error.[37] The court also stated that the "consultative process dictated by Congress serves the purpose of permitting the States to participate in the formulation of federal policy *in an area of major interest to the States*."[38]

Not surprisingly, the lines drawn in federal policy with respect to regulatory jurisdiction over activities involving land and water resources is an area of major interest to the State. In light of the Ninth Circuit's holding in *DOE*, the EPA and Corps' teleconferences held this summer and fall with interested states regarding the proposed rule likewise fail to satisfy the federal-state consultation required under the CWA and EO 13132.[39]

C. The rulemaking fails to comply with applicable rulemaking requirements and results in a muddled and confusing rule that generates enormous uncertainty.

Despite EPA and the Corps' claim that the proposed rule promotes "transparency, predictability, and consistency,"[40] the numerous difficulties in implementing the rule and the severe consequences it will wreak have not been adequately considered. The rulemaking fails to comply with the APA[41] and Executive Order 13563,[42] in large part because the federal agencies have not adequately considered the likely impacts of the rulemaking, nor allowed for meaningful public comment or review of the data the agencies rely upon.

1. As a consequence of failing to consult with co-regulator states, EPA and the Corps promulgated a proposed rule that fails to account for the regional differences existing among the states.

Proposed national rules cannot assume, as this one does, that "one size fits all," that a rule that works well in one part of the country will work just as well elsewhere. Given the significant differences in regional geomorphologic and hydrologic conditions between the states, it is particularly important to thoroughly consider whether there might be other approaches to the rulemaking that would work better to ensure consistency and predictability in jurisdictional determinations. One alternative that should be considered is whether states are in a better position to address any water quality issues that EPA and the Corps are trying to target with the proposed rulemaking. The states have jurisdiction over groundwater, and are in the best position

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[36] *Id.* at 1081.
[37] *Id.* at 1081.
[38] *Id.* at 1092 (emphasis added).
[39] Indeed, the Ninth Circuit held that the meetings and conferences arranged through a quasi-governmental organization – like the teleconferences EPA and the Corps arranged on the proposed rule – did not provide "meaningful opportunities for dialogues between the States and DOE." *Id.* at 1086.
[40] 77 Fed. Reg. at 22190.
[41] 5 U.S.C. §§ 501, *et seq.*
[42] Executive Order 13563, Improving Regulation and Regulatory Review (January 18, 2011).

to address water issues that may arise due to the "interconnectedness" of water bodies. This alone militates against EPA and the Corps' proposal of making wetlands and isolated waters jurisdictional on the basis of a "shallow subsurface hydrologic" connection.[43] Alaska has authority and responsibility to protect all waters in the State regardless of whether the federal government has concurrent jurisdiction.

A rule-making should not leave the agencies and public wondering who or what is covered by a new rule and what requirements are being added or changed. There is significant uncertainty, particularly under Alaska's unique circumstances, of how the proposed concepts of "adjacency" "tributaries" and "interconnectedness" would be applied to specific field situations. For example, it is unclear whether these terms would exclude alpine muskeg peat bogs, or forested wetlands on steep slopes in southeast Alaska that do not have a traditional hydrological connection (defined bed, bank or ordinary high water mark). There are also wetlands that exist on the North Slope of Alaska as a result of relatively flat terrain, and seasonal snowmelt that cannot penetrate frozen soil. These areas can be tens, or even hundreds of miles from the nearest navigable water. The proposed rule only creates greater uncertainty for Alaska.

2. Issues surrounding the development, content, peer review, and use of the draft Connectivity Report render it incomplete and unreliable as support for this or any proposed jurisdictional rulemaking.

In the proposed rule, EPA and the Corps based many conclusions on the 2013 draft Connectivity Report.[44] The agencies conclude that certain waters categorically have a connection (biological, chemical, or physical) to jurisdictional waters. Since the agencies erroneously view any connection as a significant connection, they conclude that such waters should therefore be jurisdictional. EPA and the Corps essentially view the Connectivity Report as a significant nexus analysis. However, at the time EPA relied upon the report, it was still undergoing peer review, and the report itself is in need of significant additional work and improvement to be relevant for Alaska.

Through testimony and written comments submitted to the SAB Peer Review Panel, the State pointed out the lack of Alaska-specific information and references about wetlands and aquatic conditions common to northern latitudes that are uncommon or entirely absent in the rest of the country (e.g., permafrost, tundra, muskegs, boreal forest spruce bogs, glaciers, massive snowfields). Additional conditions that make Alaska unique, but which are not discussed in the Connectivity Report, include complex and variable connections of groundwater in areas underlain by continuous and discontinuous permafrost, seasonal flooding at spring break-up prior to the growing season, braided outwash rivers, and cold, low-nutrient streams.[45] With 63% of the

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[43] Introduction of the term "shallow subsurface hydrologic connection" without definition in the proposed rule as if the term was distinct from a "groundwater connection" raises questions on whether EPA and the Corps are asserting authority where they have none. This makes the agencies vulnerable to charges they are seeking to secure more expansive federal jurisdiction than historically asserted.

[44] Draft *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, U.S. Environmental Protection Agency, Washington, D.C. 2013.

[45] For further information on these conditions, *see* the discussion below on "Alaska's Water and Wetlands Situation."

country's wetlands located in Alaska, the majority of which are associated with vast tracts of continuous or discontinuous permafrost, EPA and the Corps are remiss for not completing a rigorous review of scientific studies based on work in Alaska as part of the Connectivity Report. The State has provided examples of such studies in comments to the SAB's Peer Review Panel which are enclosed herein.

The proposed rule and draft Connectivity Report lack consideration of regional geomorphologic and hydrologic differences. There is a large difference between those states with a wetter climate than those with a drier climate. Tributaries and ephemeral streams will have a significant difference in appearance, seasonality, and level of input to downstream waters in a wetter climate than they would in a drier climate. Given Alaska's large geographic and climatic range, we have both situations within our borders (temperate rainforests in southeast Alaska with average annual precipitation rates of up to 153.3 inches (Ketchikan) and drier climates in the interior and northern portions of the State which receive annually less than 5 inches of "rainfall equivalent" precipitation (Barrow)) (Data from NOAA). There is also a significant difference in the impact of tributaries and ephemeral streams in a northern latitude climate. In Alaska, the majority of the waters (surface and subsurface) in nearly 2/3 of the state exist as a solid for the better part of each year. Only for the short summer season do they exhibit some of the traits and provide some of the functions normally attributed to waters and wetlands. These attributes of northern latitude climates limit or foreclose connectivity and the potential to impact traditional navigable waters.

The proposed rule does not consider in-state Alaska specific hydrologic regime variations, or even hydrological differences across other regions in the U.S. For example, all ephemeral and intermittent streams are classified as tributaries without regard to climate and based solely on the presence of a bed, bank, and ordinary high water mark. Due to regional differences, the State requests that EPA and the Corps continue dialogue with all the states in order to craft a proposed rule informed by regional differences that is beneficial for implementing the CWA programs administered by both state and federal agencies.

A rulemaking should account for regional differences, such as climate and hydrologic differences that may come into play during jurisdictional determinations. The federal agencies should consider and account for Alaska-specific differences in climate, hydrology and geography within the proposed rule. Given the vast differences in geography and climate among the regions, particularly for Alaska, broad national standards may not lead to reasonable assertions of federal jurisdiction. Also, in keeping with the Supreme Court's ruling in *SWANCC*,[46] any rulemaking should include a provision that explicitly excludes isolated, intrastate, and non-navigable waters as non-jurisdictional.

Apart from the content of the report, we note that the peer review and agency reliance on the report are fundamentally undermined by EPA's failure to comply with peer review principles recognized by EPA and the Office of Management and Budget (OMB). OMB observes that "when an information product is a critical

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[46] *Cf.* 531 U.S. at 168 (stating that "[i]n order to rule for the [Corps], we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open waters. But we conclude that the text of the statute will not allow this").

component of rule-making, it is important to obtain peer review *before* the agency announces its regulatory options so that any technical corrections can be made *before the agency becomes invested in a specific approach or the positions of interest groups have hardened.*"[47] Likewise, EPA holds that peer review "is a process for enhancing scientific or technical work product so that the decision or position taken by the Agency, based on that product, has a sound, credible basis."[48] Because the proposed rule prematurely relied on a draft, incomplete, non-peer reviewed report, EPA and the Corps are already invested in an approach that may not be supported by the peer review process. Further, EPA's release of a proposed rule before the peer review was completed may have caused bias in the peer review towards not only the conclusions reached in the Connectivity Report, but also the approach adopted by EPA and the Corps in the prematurely released proposed rule. Thus, the muddled process EPA took in promulgating a proposed rule before any scientific review was completed puts the proverbial cart before the horse, with a strong potential to create bias in both written products.

3. Rather than assuring consistent, predictable, and timely jurisdictional determinations, the proposed rule will create further confusion.

Despite its length,[49] the proposed rule does not set forth sufficient criteria for determining whether a wetland or water body will be deemed jurisdictional. There is much that is discussed in the preamble that is not included in the language of the rule. While some of the terms are newly defined (e.g., adjacent), new terms of art are added that are not defined (e.g., shallow subsurface hydrologic connection). The *Rapanos* decision provides guidance and opinion but does not establish regulatory criteria for determining whether a wetland will be deemed jurisdictional. Rather than address this critical issue, the agencies chose to focus on expanding what is jurisdictional in contravention to the import of *Rapanos* which sets boundaries on what is jurisdictional. Due to the expansive interpretation that EPA and the Corps give to Justice Kennedy's significant nexus test in *Rapanos*, the agencies proceed to apply significant nexus to multiple situations that were not even under consideration by the Court (e.g., to tributaries and adjacent waters).

Many questions and concerns revolve around new terms and concepts introduced in the proposed rule. For example, the term "similarly situated" waters as defined by the agencies may be more expansive than what Justice Kennedy intended in his 2006 *Rapanos* opinion. The term itself is likely to be subjectively and inconsistently applied by individual field staff personnel. The EPA and Corps staff did not explain how the agency will ensure consistent implementation of the proposed rule on the ground, especially with respect to consistency in the application of the "significant nexus" test. But, that could be based on the Corps and EPA's assumption (which they say is already assumed today under existing guidance) that most of the non-navigable

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[47] OMB Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2668 (Jan. 14, 2005) (emphases added).

[48] EPA, Science Policy Council, *U.S. Environmental Protection Agency Peer Review Handbook*, available at http://www.epa.gov/peerreview/pdfs/peer_review_handbook_2006.pdf .

[49] In comparison, we note that the 2008 guidance was 13 pages total, and already unwieldy and complicated. The 2011 draft guidance was 39 pages long. The proposed rule is now 89 pages long, not including other documents the agencies used and referenced.

waters and wetlands throughout the country are jurisdictional, unless they qualify for one of the handful of specific exceptions set out in the proposed rule. This expansive and automatic affirmative jurisdictional view regarding Alaska waters and wetlands certainly ignores the "case-by-case" determinations that Justice Kennedy stated was required for the Corps to impose its authority.

4. **Any new rule must provide the opportunity for an affected state, landowner, or developer – in advance of imposition of any CWA requirement – to obtain timely response to requests for jurisdictional determinations, as well as to administratively and judicially challenge an affirmative jurisdictional determination.**

In Alaska, there is so much at stake in advancing a development proposal that a decision to seek a permit under the CWA is often based on the cost of keeping a project moving and does not reflect an assessment of whether jurisdiction exists or is even likely to exist as there is no process to ***timely*** challenge an affirmative jurisdictional determination. With a short construction season (three to five months) and the long lead time for staging materials in areas with no roads at all (access is only after travel of hundreds of miles by boat or plane), there is a narrow window each year to conduct field work and obtain approvals for the next season. It is not possible to collect field data for a 404 permit application and receive approvals in the same season in time to stage and initiate work on a project. Since decisions to initiate work must often be made four to six months in advance of the construction season, there are only a couple of months after field data is collected to submit an application and received approval. It is a common occurrence that projects start no earlier than two years after field data collection. Project delay often comes at a significant cost to the project proponent.

Numerous cases exist where applicants cede to the assertion of federal jurisdiction over questionable waters to avoid the need for the Corps to thoroughly document why it is (or is not) taking jurisdiction. Applicants conclude that, with the brief construction season in Alaska, the delay which could result from a drawn out significant nexus determination would be costlier than accepting jurisdiction and complying with permit stipulations and compensatory mitigation requirements. It is uncertain how many of these cases would have resulted in a finding of no jurisdiction had the applicant opted to request an approved jurisdictional determination. However, as the cost of compensatory mitigation continues to increase throughout Alaska, it is possible that the cost-benefit analysis of construction delays versus accepting federal jurisdiction and paying for compensatory mitigation may shift, motivating more applicants to go through the longer approved jurisdictional determination process in the hopes of reducing compensatory mitigation needs. Adoption of the proposed rule would likely narrow opportunities to demonstrate the lack of a significant nexus and could, in the long run, result in increased compensatory mitigation requirements.

To address these long-standing issues, any proposed rule should provide landowners and project proponents with two important and efficient avenues to address CWA jurisdictional concerns. First, a provision should be included that if a landowner or project proponent requests a formal jurisdictional determination and the regulatory authority does not provide one within 30 days, the failure to respond will be deemed a negative jurisdictional determination not only under Section 404, but for all CWA purposes.

Second, a rule must clearly provide a requestor with a process to not only administratively appeal, but also judicially challenge affirmative jurisdictional determinations in advance of imposing the permitting process. This is particularly important because federal agencies take the position that jurisdictional determinations are not considered appealable, final agency actions. That is, no person or entity can judicially challenge an affirmative jurisdictional determination until the actual permitting process – an expensive and time-consuming endeavor – has been completed. In the meantime, absent any meaningful remedy to address challenges to affirmative jurisdictional determinations, individuals and entities are forced to materially change their positions once the permitting process is imposed. In most instances, applicants must enter into legally binding commitments and contractual obligations, spending on average hundreds of thousands of dollars to complete the lengthy 404 (and under the proposed rule, 402) permitting process and advancing expensive compensatory mitigation proposals, in order to obtain a permit and avoid a federal enforcement action when there may well be no legitimate jurisdiction for imposing the federal permitting process.[50]

5. EPA and the Corps failed to consider the consequences of a proposed rule that seeks to impose a broad array of CWA requirements.

EPA and the Corps have promulgated a rule that applies not only to Section 404 permitting, but to other aspects of the CWA, including 402 permitting and regulatory requirements under Section 303. Thus, for example, for every water (including wetland) that the proposed rule would sweep under CWA jurisdiction as a water of the U.S., state water quality standards would then apply. That is because there is the potential that the states will have to classify the uses of newly jurisdictional waters for application of State water quality standards.

Another example is how this proposed rulemaking will affect stormwater management, because under the rule, multi-sector (MS4) stormwater conveyances, including ditches, will likely be jurisdictional under the proposed rule, and also subject to state water quality standards. Would activities to maintain those conveyances also be subject to 404 permitting?

Other questions abound: Will new jurisdictional waters require preparation of Spill Prevention, Control, and Countermeasures (SPCC) plans? Will green infrastructure projects, not exempted under the rule, also become subject to CWA requirements? Will existing jurisdictional determinations and uses in waters that will fall under the proposed rule be grandfathered in, or will new jurisdictional determinations or CWA requirements be imposed? What regulatory costs and burdens will be created for states in light of their 401 certification authority in approving projects requiring either a 402 or 404 permit? What will be the costs and impacts to the state and federal regulatory authorities for enforcing compliance under CWA programs?

The preamble to the rule states that the Corps prepared an environmental assessment under the National Environmental Policy Act (NEPA) for this rulemaking[51]. However, the website for the proposed rule apparently

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[50] *Cf.* subparagraphs 6 and 7, below, describing these costs and burdens in additional detail.
[51] 79 Fed. Reg. 22222.

does not contain the EA, and it is impossible to assess the adequacy of the document. Moreover, because this rulemaking will likely result in significant impacts, it constitutes major federal action requiring the preparation of an environmental impact statement (EIS) under NEPA[52].

By failing to adequately probe and describe the regulatory and economic impacts that sweeping imposition of CWA requirements would have if expansive jurisdiction under the proposed rule's provisions is triggered, EPA and the Corps have created enormous and unacceptable regulatory uncertainty.

6. Delays and costs in Section 404 and 402 permitting will increase, but EPA and the Corps failed to address these concerns in this rulemaking.

EPA and the Corps assert that the proposed rule only clarifies the scope of "waters of the U.S." under the CWA, rather than subjecting entities to additional regulatory burdens.[53] However, the proposed rule will only increase the need for more Section 404 permits, along with NEPA reviews, other required regulatory reviews (such as Endangered Species Act reviews), and compensatory mitigation requirements. Roughly 10 years ago, the time and average costs of obtaining a 404 permit were already significant: 788 days and $271,596 for an individual permit; 313 days and $28,915 for a nationwide permit.[54] These costs did not include costs for mitigation or design changes. As might be expected, these sorts of costs are higher now with inflation, and also create an enormous burden on small landowners and small businesses, those who are least able to absorb the costs.

Without adequate basis, EPA and the Corps have certified under the Regulatory Flexibility Act (RFA)[55] that the proposed rule would not have significant effects on small businesses. The United States Small Business Administration's Office of Advocacy has determined that the certification was improper, and that the proposed rule will indeed have direct, significant effects on small businesses. EPA and the Corps are required to conduct a full analysis of the proposed rule's effect on small business under the RFA, including the requirement to convene a Small Business Advocacy Review panel to facilitate the review.[56]

Even for large businesses and governmental entities sponsoring large projects, these costs serve as a drag on economic activity and job creation. The costs will only multiply with the additional waters that would become jurisdictional under the proposed rule. While transactions with mitigation banks and in-lieu fee programs are not publicly disclosed by the Corps, the state agencies involved in projects that require such mitigation are aware that credits are expensive, and often significantly reduce limited funding available for projects. Based on a preliminary review, the State paid the Conservation Fund over $8 million for public projects (i.e., bridges, roads, and rural airport projects) between 2009 through 2015. It is not clear from EPA's

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[52] 42 U.S.C. 102(c).
[53] 79 Fed. Reg. 22220.
[54] *Rapanos*, 547 U.S. at 721 (footnote and citations omitted).
[55] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601, et seq.). A copy of the Office of Advocacy's October 1, 2014 letter to EPA and the Corps is enclosed and incorporated as part of the State's comments on the proposed rule.
[56] 5 U.S.C. §§ 603 and 605.

economic analysis whether EPA has considered these costs or the potential increases to such costs if the proposed rule were finalized and applied.

7. The economic analysis conducted by EPA and the Corps is flawed.

The proposed rule does not comply with EO 12866.[57] For example, the rule relies on nearly 20-year old cost data that has not been adjusted for inflation. As a consequence, the agencies March 2014 economic analysis[58] does not provide the public and policy makers with reliable and credible information regarding the magnitude of the proposed rule's economic impacts. Further, EPA and the Corps fail to consider future costs of compensatory mitigation in light of the expansive jurisdiction proposed under the rule. The costs for compensatory mitigation are relentlessly escalating.

By the federal agencies' own estimation, implementation of the proposed rule will result in higher costs in at least millions of dollars for the agencies and the regulated community. Section 404 permit costs are projected to increase between $19.8 million and $52 million annually, while 404 mitigation costs are projected to rise between $59.7 million and $113.5 million annually.[59]

However, the economic analysis does not include the costs associated with other CWA programs,[60] or the potential costs of litigation that will flow from the implementation of the rule. Thus, the costs of adopting and implementing the proposed rule are likely to be exorbitant, because

- waters and wetlands that could not reasonably be found jurisdictional under a common sense reading of the CWA and Supreme Court precedent will, nonetheless, be deemed jurisdictional;
- any person or entity proposing activities in those additional waters and wetlands found to be jurisdictional under the rule will be subject to lengthy and expensive permitting reviews that produce no appreciable environmental benefit, or be exposed to stiff civil and criminal penalties for acting without a permit;
- vital public and private projects will suffer needless expense and delay, and the compensatory mitigation costs for these projects will increase; and
- taxpayers will have to help fund the federal agencies' ambitious exercise of nearly boundless jurisdictional authority under the guidance.

In short, EPA has not adequately analyzed the costs of imposing the proposed rule. As one expert concluded, the agencies have underestimated the costs because of the flawed methodology the agencies used to determine the extent of acreage that the proposed rule would regulate, and because the agencies failed to consider the costs and increased number of required permitting actions.[61]

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[57] Executive Order 12866, Regulatory Planning and Review (September 30, 1993).
[58] Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (March 2014).
[59] *Id.* at 16.
[60] *Id.* at 12.
[61] D. Sunding, *The Waters Advocacy Coalition, Review of 2014 EPA Economic Analysis of Proposed Definition of Waters of the United States* (May 15, 2014). Dr. David Sunding is an economics professor at University of California, Berkeley.

8. The proposed rule, if finalized, will cause a proliferation of third party litigation and citizen suits.

The citizen suit provision is already used in an attempt to force affirmative jurisdictional determinations, even when EPA and the Corps do not believe jurisdiction is warranted.[62] The proposed rule, if finalized, is certain to trigger a huge increase in the number of citizen suits against federal, state, local, and private landowners and developers. By making so many waters (including wetlands) automatically subject to CWA requirements, or creating so much uncertainty about what waters could be subject to CWA requirements, EPA and the Corps have created a regulatory system that leaves public and private organizations and landowners vulnerable to third party litigation and citizen suits. Litigation tactics will become more prolific under the proposed rule. Not only will these third parties likely seek to impose a wide array of CWA requirements, they will likely seek penalties for alleged noncompliance. EPA and the Corps never address these or similar litigation risks relating to the proposed rule.

II. Technical Issues

A. Alaska's unique water and wetlands situation.

At more than 403 million acres, the State of Alaska encompasses the largest geographic area of any state in the nation (more than twice the area of the next largest state). Alaska has more coastline than the entire conterminous United States (nearly 34,000 miles), over three million lakes greater than five acres in size, and over 15,000 water bodies that are known to support resident or anadromous fish.[63] Its size is such that when a map of Alaska is superimposed on the lower 48 states, Alaska's boundaries' would extend roughly the equivalent of east coast to west coast (see Attachment 4).

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[62] *See San Francisco Baykeeper v. Cargill Salt*, 481 F.3d 700 (9th Cir. 2007), in which an environmental group brought a citizen suit seeking to impose CWA requirements, even though federal agencies declined to assert jurisdiction over the isolated industrial ponds at issue. The Ninth Circuit held that the group failed to show that the ponds in that case constituted "adjacent wetlands." Under the proposed rule, the federal agencies would likely have a difficult time defending against a renewed claim that the ponds are jurisdictional, because the agencies expand the definition of "adjacency" to include waters more broadly, not just wetlands as has historically been the practice and which has been held to be the limit of CWA jurisdiction under Supreme Court precedent.

[63] Alaska Department of Fish and Game, *Catalog of Waters Important for the Spawning, Rearing or Migration of Anadromous Fishes*, available at: http://www.adfg.alaska.gov/sf/SARR/AWC/index.cfm?ADFG=main.overview.

Wetlands and deepwater habitat combined occupy over 204 million acres, or over 50 percent of the State's surface area.[64] By comparison, wetlands and deepwater habitat comprise a little more than nine percent of the surface area of the lower 48 states.[65]

Setting aside deepwater habitat, the State of Alaska has over 174 million acres of wetlands, comprising approximately 43 percent of the surface area of the State.[66] The rest of the U.S. contains approximately 103 million acres of wetlands, comprising approximately four percent of the surface area.[67] Sixty-three percent of the country's wetlands are in Alaska. Using National Hydrography Dataset information from the Bureau of Land Management (March 2014) Alaska has 884,075 miles of streams and 21,655 square miles of lakes.

Despite Alaska's wealth of water, its water resources are not uniformly distributed. According to the U.S. Army Corps of Engineers, "[w]etlands occupy 61 percent of Northern and Western Alaska," and "vast expanses of treeless tundra underlain by permafrost dominate the area."[68] These permafrost wetlands are a unique feature of the Alaskan landscape not found elsewhere in the United States. Interior Alaska is 44 percent wetlands and includes, "millions of acres of black spruce . . . muskeg and floodplain wetlands . . ."[69] Here again, the scrub/shrub vegetation and taiga forests of interior Alaska are uncommon features in the rest of the United States and many of these wetlands are underlain by permafrost (See Attachment 5).

Adding to the uniqueness and complexity of Alaska's situation is that the majority of the waters in the vast northern, interior, and western regions exist as a solid for the better part of each year. Only for the short summer season do they exhibit some of the traits and provide some of the functions normally attributed to waters and wetlands. Southeast Alaska, a temperate, mountainous rainforest region with a maritime climate and average annual precipitation of 100 to 200 inches, has countless isolated surface waters and wetlands, as does much of the rest of the state.

There is a unique situation in northern latitudes, including Alaska, where continuous or discontinuous permafrost exists. This results from frozen ground water throughout all or the majority of the year. Permafrost can form a nearly impervious layer of soil which then creates seasonally saturated soil conditions above the frozen layer. Depending on topography, soil types, and other features permafrost tends to be associated with wetlands. Wetlands in areas with permafrost are very dynamic systems that are not completely understood. While they serve certain valuable habitat functions, these functions do not make them subject to federal CWA

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[64] Hall, Jonathan V., W. E. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, available at http://www.fws.gov/wetlands/_documents/gSandT/StateRegionalReports/StatusAlaskaWetlands.pdf

[65] *Id.*
[66] *Id.*

[67] *Id.*
[68] U.S. Army Corps of Engineers, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, September 2007.
[69] *Id.*

jurisdiction. Moreover, due to a very short growing season (that may be interrupted with frosts) and hydric soils that generally hover around a "biological zero" temperature, it can be difficult to demonstrate a significant nexus to downstream waters and wetlands within permafrost areas. There is often a significant temporal lag in hydrology (freeze/thaw cycle and lack of slope) that is more equivalent to groundwater flow and in most cases there is little evidence of a significant subsurface connection.

Making permafrost even more difficult to understand is the fact that it is not distributed evenly within the State. There are areas of the State, mostly located in the northern areas, where permafrost is generally distributed continuously beneath the surface. There are also areas within the State where permafrost is discontinuous and sporadically distributed within isolated pockets on the landscape. This sporadic distribution can be related to soil types, aspect, or other geographic indicators.

B. Regional differences affect whether waters are jurisdictional.

The Corps' 1987 wetlands delineation manual (1987 Manual) was developed to provide criteria for identifying wetlands, and was viewed approvingly by Congress in subsequent legislation as a tool to assist the federal agencies in determining what may be jurisdictional wetlands under the CWA. Due to regional differences in vegetation, soils, and hydrology, application of the 1987 Manual to all regions proved unworkable. This is particularly the case for Alaska, given that permafrost is not even discussed in the manual. To address these and other issues, the federal agencies have developed over the years regional supplements to the 1987 manual to provide a more regional approach to wetland delineations.

These supplements, including the 2007 Regional Supplement for Alaska, are guidance. However, because they established criteria for determining whether a wetland is jurisdictional under the CWA, they should have been adopted under formal APA rulemaking. EPA and the Corps must consider regionalized rulemaking for jurisdictional determinations and conducting significant nexus determinations, since the proposed rule does not account for regional differences, and application of the proposed rule could result in the assertion of jurisdiction when it does not lawfully exist for the majority of waters or wetlands in a particular climate region.

C. Significant Nexus – under the proposed rule, essentially all waters (including wetlands) will become jurisdictional no matter how geographically remote or attenuated their impact on traditional navigable waters.

The proposed rule would provide a new definition of the term "significant nexus" based on the *SWANCC* and *Rapanos* decisions. The definition is generally consistent with that of Justice Kennedy's opinion in *Rapanos*, with the additional explanation that "Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a [jurisdictional] water identified in paragraphs (a)(1) through (3) of this section." The definition also notes that the region includes "the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section." This appears to be a departure from the current understanding of "similarly situated" waters in the 2008 guidance, which limits evaluation to waters and

adjacent wetlands within the reach of the stream of the same order. The new definition appears to expand consideration of similarly situated waters to all functionally similar wetlands within the watershed of a tributary that flows into a traditional navigable water, interstate water, or the territorial seas.

The proposed rule goes on to state that "for an effect to be significant, it must be more than speculative or insubstantial." This does not provide sufficient definition to the term 'significant' and will be difficult to implement with any consistency. Unfortunately, this language from Kennedy's *Rapanos* decision is used in the proposed rule in isolation, divorced from its context and becomes, at best, a definition of statistical significance indicating whether a variable has a discernible effect rather than addressing the critical question of a definition or threshold that measures the magnitude of the effect and then determines when such effects have a significant impact on characteristics of traditional navigable waters. Significant nexus in the proposed rule is descriptive of a connection but **not** predictive of impact; no light is shed on whether the characteristics of a traditional navigable water would change in a meaningful way if that connection did not exist. The proposed rule needs a clear definition of significant nexus that sets the standard for when similarly situated waters that are part of the same stream reach, and adjacent wetlands would change the characteristics of a traditional navigable water in a meaningful way beyond what would happen if that connection did not exist.

1. Significant nexus between geographically separated other waters.

The current language in the proposed rule as well as the preamble suggest that for "other waters" – that is, waters that do not fall into a specific category – are not jurisdictional as a single category but rather can be found jurisdictional on a case-specific basis. "Other waters" will be evaluated either individually or as a group of waters that have been determined "similarly situated" within a "region." The preamble states that "waters are similarly situated where they perform similar functions and are located sufficiently close together." Once it has been determined that there are "similarly situated" waters, then a case-specific significant nexus analysis would be conducted to determine if these waters are Waters of the U.S. The jurisdictional status of such waters would be indeterminate until the case-specific significant nexus analysis is completed.

This proposed change lacks sufficient definition and clarity for the applicant, and regulators. Case-specific analysis is very resource intensive and since the burden to prove a water or wetland is not jurisdictional lies with an applicant this could become very cost prohibitive. The State recommends that the federal agencies provide clarification and define terms such as "region" and "sufficiently close" to reduce confusion. Without this clarification, one could interpret the language as stated in the proposed rule to mean that significant nexus analyses would be required on large-scale watersheds. In some cases applicants may simply treat geographically separated waters as jurisdictional in order to avoid the burden of proving that these waters do not in fact have a significant nexus to a downstream water.

Moreover, until the federal agencies prove otherwise, "other waters" should be deemed non-jurisdictional. Notably, with this approach, the "other waters" are still regulated by states, so there is no absence of regulation.

Since geographically separated "other waters" do not have readily discernible characteristics that would demonstrate significant nexus, the default status should be non-jurisdictional unless and until a case-specific significant nexus analysis shows otherwise. If a case-specific significant nexus analysis demonstrates jurisdiction, that jurisdictional status should apply from that point in time forward unless and until material circumstances change (i.e., fill was permitted under a CWA Section 404 permit including any compensatory mitigation requirements of such a permit).

Further, as a legal matter, the State notes that EPA and the Corps inappropriately expand the significant nexus test to cover "waters," rather than just "wetlands" as Justice Kennedy opined in *Rapanos*. This will result in an unlawful and significant expansion of federal jurisdiction over waters that would, under Justice Kennedy's test, not be covered.

2. The use of "shallow subsurface hydrologic connections" to support jurisdiction.

The CWA does not provide federal jurisdiction over groundwater, which is under the state's exclusive jurisdiction. However, the language in the proposed rule suggests that a wetland within the riparian area may be deemed "adjacent" and jurisdictional where there is "surface or ***subsurface*** hydrology" (emphasis added) that directly influences the ecology in the area. The preamble suggests that tributaries and other waters may be connected by "shallow subsurface hydrologic connections" but neither the preamble nor the proposed rule defines what is intended by using these terms and there is inconsistency on whether the modifier "shallow" is applied or even what "shallow" means. The incorporation of "shallow subsurface" hydrology would be significantly problematic for implementation in Alaska due to suprapermafrost water. This is the seasonal snow melt water within the soil above the frozen layer of permafrost soil. The application of the latter term (shallow subsurface hydrologic connection) may involve consideration of groundwater, tributary or alluvial groundwater, waters that are stored in the bed and banks of streams, or even soil moisture, once again expanding federal jurisdictional reach without legal basis or limit. Any rule should expressly exclude permafrost lands from CWA jurisdiction, due to permafrost's unique conditions. Further, the federal agencies should not use shallow subsurface waters – i.e., groundwaters – as a means to assert CWA jurisdiction over waters and wetlands that are upgradient of groundwaters and navigable waters.

3. Importance of flow timescales for shallow subsurface hydrologic connections and definitions for neighboring and riparian area.

The preamble discussion does not provide the necessary context for considering whether subsurface connections have a role to play in determining jurisdiction. There is an over emphasis on the mere existence of connections without discussion of the importance of the connections. While one can consider the entire world as an interconnected ecosystem under sufficiently large time scales, it is established practice to consider different subdivisions (e.g., atmosphere, oceans, lands, biosphere, etc.). Likewise, the hydrologic cycle has defined elements including surface waters, groundwater, atmosphere, and biological life. These divisions have utility despite the challenge of drawing bright lines in all circumstances (e.g., the vadose zone of soil where all the elements of the hydrological cycle are present and are not easily separable).

The proposed rule does not adequately define physical differences and does not even consider timescale differences when trying to establish the jurisdictional boundaries between surface water and groundwater. Arguably, timescale differences in flow are the most significant differentiator between ground water and surface water. Any definition of shallow subsurface hydrologic connection must address flow timescales. Any determination of jurisdiction for waters upstream or upgradient of a shallow subsurface hydrologic connection must likewise consider flow timescales, in addition to considering the significance of any effects on downstream waters. Note that groundwater, including shallow subsurface water, is under the clear jurisdiction of states.

The definitions of "neighboring" and "riparian area" are inconsistent. Neighboring uses the phrase "with a shallow subsurface hydrologic connection" while riparian uses where "subsurface hydrology directly influences …" There should be consistency in the definitions that only significant effects on the characteristics of downstream traditionally navigable waters are important. This would require a definition for shallow subsurface hydrologic connection. This would also require that the riparian area definition language use threshold language for when there is a significant effect on the characteristics of traditional navigable waters rather than the indiscriminate "influences."

Additionally, in the definition of "neighboring," the phrase "or confined surface hydrologic connection" is unnecessary, adds confusion, and should be struck. If such a connection exists, under the proposed rule that would be considered under the definition of tributary.

4. Assertion of jurisdiction over "wetland mosaics."

The CWA does not confer federal jurisdiction to the EPA and Corps for an entire "wetland mosaic" containing wetlands that are not adjacent to or hydrologically connected to a navigable water, and any activities in these areas are already subject to state jurisdiction. The federal agencies cannot "jump over" the uplands/non-wetlands to other wetlands to assert federal jurisdiction simply because they determine an area to be a "wetland mosaic." Similarly, the Supreme Court stated that federal jurisdiction is not limitless -- it did not say that federal jurisdiction extends to wetlands adjacent to wetlands, adjacent to wetlands, adjacent to a navigable water. This stretches the definition of contiguous beyond the breaking point when wetlands that have an insignificant effect on traditional navigable waters are jurisdictional on the basis of contiguity particularly when the insignificant effects occur over timescales that are more akin to groundwater than surface water flow.

D. Tributaries – The proposed rule would apply the significant nexus test to tributaries and isolated waters, when Justice Kennedy held it was only applicable to wetlands.

All tributaries of jurisdictional waters would become jurisdictional by rule. Under the 2008 guidance, ephemeral (or non-relatively permanent) tributaries to traditional navigable waters required a significant nexus to establish jurisdiction. Under the Proposed Rule, the agencies determined that all tributaries of traditional navigable waters, including ephemeral tributaries, have a significant nexus with traditional navigable waters and are therefore proposed to be jurisdictional by rule. The significant nexus finding is based on the conclusions of the draft Connectivity Report (EPA 2013), which has not been completed, nor does it address Alaska's unique circumstances.

1. Wetlands, lakes, and ponds should not be included in the proposed definition of "tributary."

The proposed rule defines tributaries as waters that have a bed, bank and ordinary high water mark (OHWM). The tributary must also contribute flow either directly, or through another water, to a jurisdictional water. The proposed definition also includes wetlands, lakes, and ponds, even if they do not have a bed, bank and OHWM. Including these types of waters within the definition of "tributary" is not scientifically supported. On page 2 of their September 17, 2014 draft comments on the proposed rule, the SAB peer review panel stated that "tributaries are not typically defined to include lentic systems (e.g., lakes, ponds, wetlands)." The peer review panel went on to recommend that EPA consider whether flow-through lentic systems should be included as adjacent waters and wetlands, rather than defined as tributaries.

The inclusion of wetlands, lakes, and ponds in the definition of "tributary" adds significant confusion and would create significant implementation problems. Any rulemaking should not subject lakes and ponds to the significant nexus test, as that test is inapplicable for these types of waters, and is only applicable, if at all, to wetlands. Further, ponds and lakes without a surface water connection to downstream navigable waters should be categorically excluded from jurisdiction.

2. The rule should exclude roadside ditches as non-jurisdictional.

The proposed rule also newly states that jurisdictional tributaries may be man-made or man-altered. The proposed rule states that "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" are not "waters of the U.S." The proposed rule adds a second exclusion which states "(b)(4) ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section" are not Waters of the United States. This exclusion clarifies that a ditch is not jurisdictional (even if it has perennial flow) if it does not transport flow into another jurisdictional water. As outlined in section (c)(5) of the proposed rule, jurisdictional tributaries would include "ditches not excluded in paragraph (b)(3) or (b)(4)." Most if not all the roadside ditches within Alaska would be classified as jurisdictional because those ditches that would fall within the two exclusions are rare. Most if not all the roadside ditches contribute flow into a jurisdictional tributary (either directly, or through another water). All roadside ditches should be excluded from jurisdiction because a large portion of the nation's public and private transportation infrastructure relies on drainage structures that transport water away from facilities. The federal agencies did not consider the significant confusion and workload that will occur with these changes. Water quality concerns from roadside ditches are already addressed in Section 402 permits and state Section 401 certifications of Section 404 permits.

E. Adjacent Waters

Appendix B of the rulemaking (Legal Analysis)[70] contains the agencies' rationale for its new regulatory term "adjacent waters." The agencies begin the discussion by referencing CWA Section 404(g), the statutory provision that allows individual states to assume responsibility for administering a Section 404 dredge and fill

[70] 79 Fed. Reg. 22260.

program within their borders. The agencies note that Section 404(g) excludes certain navigable waters and their adjacent ***wetlands*** from state-run programs. EPA and the Corps then couple the term "adjacent" – from Section 404(g), and the only place the term appears in the act – with the term "waters" to buttress its rationale for expanding the scope of waters and wetlands covered by the CWA.

Not only would application of this new term "adjacent waters" vastly expand the waters and wetlands subject to federal control, it would likely leave nothing for a state to assume control over. Congress clearly did not intend either of these results. The agencies' legal analysis is a reckless construction of discrete terms and different sections of the CWA, undermining Congressional intent and creating further confusion about what waters or wetlands are ***jurisdictional*** under the CWA, versus what waters and wetlands are ***assumable*** under a state program, two distinctly different concepts.

The preamble to the rule – but not the Legal Analysis itself – qualifies that the rulemaking is not intended to "affect the scope of waters subject to state assumption of the section 404 regulatory program under Section 404(g) of the CWA," and that "[t]he scope of waters that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language of the CWA."[71] That may be the intent, but because there is no clear understanding between states that are interested in assumption and the federal agencies regarding which waters and wetlands are assumable, there is little comfort in the preamble's qualification, inasmuch as "adjacent waters" is defined so broadly.

1. Wetlands adjacent to tributaries.

Under the proposed rule, the agencies determined that all wetlands that are bordering, contiguous, or neighboring to a traditional navigable water or tributary (including perennial, intermittent, and ephemeral streams) have a significant nexus with traditional navigable waters and are therefore proposed to be jurisdictional by rule. The significant nexus finding is based on the conclusions of the draft Connectivity Report (EPA 2013). The proposed rule also removes the specific exclusion of wetlands adjacent to "waters that are themselves wetlands." This change would mean a wetland could be found to be jurisdictional based on it being adjacent to another wetland (and also, therefore, excluded from a state-managed 404 program). Example: Wetland A is now jurisdictional because it is adjacent to wetland B that was determined to be jurisdictional. The State objects to this arbitrary expansion of federal jurisdiction, and the potential impact it would have on a state-managed 404 program.

2. Adjacent non-wetland waters.

Under the existing rule (33 CFR 328.3(a)(7)), only *wetlands* adjacent to "waters of the United States" are defined as jurisdictional. The proposed rule changed this term from "adjacent wetlands" to "adjacent waters." Adjacent non-wetland and non-tributary waterbodies (e.g., lakes or ponds) are presently jurisdictional only if navigable, or otherwise have an interstate commerce connection to a traditionally navigable waters. The proposed rule would revise the definition to state "all *waters, including wetlands*, adjacent to a water identified in paragraphs (a)(1) through (5)…" would be jurisdictional based on a significant nexus with traditional

[71] *Id.* at 22200.

navigable waters. As a result, under the proposed rule, ponds, lakes, *and even shallow groundwater* – though the federal agencies protest otherwise – that are adjacent (but not a tributary) to traditional navigable waters, or their tributaries (including ephemeral streams), would become jurisdictional by rule. The proposed rule also uses terms to define "adjacent" like "neighboring," "riparian area," and "floodplain," without defining these terms, thus not fulfilling the intended purpose of the proposed rule to reduce confusion and uncertainty. The State objects to this expansion of federal jurisdiction to waters that may not have a significant nexus to a navigable water.

F. Other Waters

Prior to the *SWANCC* decision, non-adjacent wetlands and waters were often deemed jurisdictional under the "other waters" provision (33 CFR 328.3(a)(3)). The *SWANCC* decision found that the use of "isolated" non-navigable intrastate ponds by migratory birds was not a sufficient basis for jurisdiction under the CWA and required an isolated waters analysis for all waters not jurisdictional under another part of the definition (*SWANCC*). The proposed rule would eliminate the "other waters" provision from 33 CFR 328.3.

However, the use of the term as part of the new definitions under the proposed rule creates greater confusion and uncertainty, in large part due to EPA and the Corps' misinterpretation of controlling Supreme Court precedent. "All waters" or "other waters" that may be adjacent to a traditional navigable water, interstate water, the territorial seas, or tributary thereof, would now be jurisdictional under the proposed rule. Further, non-adjacent waters not jurisdictional under another part of the definition could still be found jurisdictional by a "case-specific" significant nexus determination.

This will lead to a significant increase in the assertion of federal jurisdiction where such assertion would be unlawful, mainly because the proposed rule lumps waters *and* wetlands into provisions that EPA and the Corps then intends to make subject to the significant nexus test. However, that would be an inappropriate application of Justice Kennedy's significant nexus test, which applies, if at all, only to wetlands. Moreover, EPA and the Corps have further misconstrued the test in another fundamental way: While Justice Kennedy would require a wetland to "significantly affect the chemical, physical, ***and*** biological integrity of other covered waters," the proposed rule only requires a "water" to "significantly affect[] the chemical, physical, ***or*** biological integrity" of a covered water. For these and other reasons, EPA should eliminate the vague catch-all category of "other waters" from any rulemaking.

Further, the criteria announced by the plurality in *Rapanos* should control for lakes and ponds, and addressing those water types should be fairly straight forward for rulemaking purposes. Simply stated, if there is no continuous surface water connection between a pond or lake and a downstream navigable waterbody, then they should not be viewed as tributaries and there should be no assertion of jurisdiction. These types of ponds and lakes should be ***categorically excluded*** in any rulemaking.

There are additional issues, described below, with EPA's "other waters" catchall.

1. Watershed or ecosystem approach (aggregation approach).

The proposed rule introduces a new watershed/ecosystem concept into jurisdictional determinations that, as written, would allow EPA and the Corps to "aggregate" the contributions of all similar waters within an *entire watershed* to determine whether jurisdiction should be asserted. Implementation of this portion of the proposed rule would require additional guidance and does not meet the intended purpose of the proposed rule to reduce confusion and uncertainty. Based on the significant nexus analysis provided in the proposed rule, particularly for consideration of whether or not wetlands are jurisdictional, field staff would need to start from a "watershed" standpoint, looking at the whole watershed in which the activity will occur, in determining whether jurisdiction should be asserted.

As we understand it from discussions with representatives of both federal agencies, under the existing 2008 guidance, field staff looks to the "relevant reach" of the tributary (navigable or non-navigable) relative to the adjacent wetland which is to be disturbed, a more confined geographical assessment. Under the watershed approach in the proposed rule, the relevant reach concept is no longer used, and field staff will aggregate and consider all similarly situated waters or wetlands (not just adjacent wetlands) in determining whether a significant nexus exists to a "downstream" navigable water. Thus, under the proposed rule, the analysis would start from a greater geographic area/landscape looking back at the activity and including assessment of "similarly situated waters." An entire group of waters could be determined jurisdictional without ever performing a significant nexus analysis of each of those waters. Attempts to establish classes of waters in this manner (based on assumptions instead of a case-by-case analysis) should only be done so with public involvement and comment. There is no formal written process by which these significant nexus studies would be conducted which is not consistent with the intended purpose of the proposed rule to reduce confusion and uncertainty.

Such a blanket jurisdictional approach would establish a nexus between remote intrastate waters and traditional navigable waters, even though it may not meet any common understanding of the term "significant." The proposed rule's sweeping ecosystem/watershed approach defies Supreme Court precedent, where Justice Kennedy stated that "absent more specific regulations," a pointed, "case-by-case," significant nexus analysis is required to determine whether jurisdiction over a wetland, based on adjacency to a navigable water, is appropriately exercised.[72]

Additionally, wet areas isolated from tributaries because they are hydrologically disconnected are likely to be held jurisdictional, requiring enormous effort to verify or rebut the presumption of jurisdiction. This will put project proponents at a significant disadvantage when a wrong, but non-appealable decision, is made by federal agency staff. It will lead to delays in projects, costs of inflation associated with delayed construction, and the cost of hiring experts and lawyers to debate jurisdiction.

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[72] 547 U.S. 782.

2. "Similarly Situated" -- Significant nexus based on similarly situated waters of same watershed

Under the proposed rule, non-navigable tributaries, isolated waters, and wetlands in Alaska with no significant nexus will be deemed jurisdictional. Application of the new factors set forth in the proposed rule allows broad assumptions rather than an actual case-by-case assessment by field staff to determine whether a water or wetland is jurisdictional. This means that more isolated waters and wetlands in Alaska will likely be determined jurisdictional, even if there is no meaningful, significant nexus of those waters and wetlands to a navigable waterbody. In fact, the proposed rule incorrectly applies Justice Kennedy's "significant nexus" concept to the formula for determining whether ***tributary or adjacent waters*** are jurisdictional, when Justice Kennedy limits this concept to ***wetlands*** jurisdictional determinations.

Even under existing 2008 guidance, using assumptions for wetlands jurisdictional determinations instead of actual factual inquiries, the agencies are determining too many of these waters and wetlands are jurisdictional, without devoting appropriate review to whether the nexus between them and a navigable water is significant under Justice Kennedy's *Rapanos* analysis, much less what might be determined a relatively permanent, continuous surface water connection of a wetland to a navigable waterbody under Justice Scalia's *Rapanos* plurality decision.

Even if one were to assume that Justice Kennedy's significant nexus test is the controlling test for determining federal jurisdiction, that test as opined by Justice Kennedy requires the government to demonstrate its jurisdiction on a cases-by-case basis. The proposed rule, however, clearly departs from that required, heavily fact-dependent demonstration, and instructs field staff that it may make assumptions about whether "similarly situated waters" are jurisdictional.

Such assumptions cannot withstand judicial scrutiny. Indeed, the Fourth Circuit Court of Appeals, in *Precon Development Corp. v. Army Corps of Engineers*,[73] reversed the district court and found that the Corps failed to demonstrate its finding of a significant nexus between wetlands present in a residential development to the Northwest River, a navigable water located several miles away. The circuit court stated that "[w]e ask only that in cases like this one, involving wetlands running alongside a ditch miles from any navigable water, the Corps pay particular attention to documenting why such wetlands significantly, rather than insubstantially, affect the integrity of navigable waters."[74] The court held that the Corps failed to demonstrate that sediment and nutrient loading were at issue for the Northwest River, and how wetlands located miles away were significant in controlling these pollutants or reducing the potential for flooding in the river.[75] In short, the court held that the Corps must make quantitative or qualitative showing of how a wetland significantly affects the ecological or physical integrity of a navigable water. In response to the circuit court's remand, the Corps conducted additional jurisdictional findings and gathered additional supporting documents. When the district court reviewed the

[73] 633 F.3d 278 (4th Cir. 2011).
[74] *Id.* at 297.
[75] *Id.* at 293-297.

post-remand administrative records, it found that the Corps had compiled a record that met the circuit court's test to support the agency's asserted jurisdiction over the wetlands at issue in the case.[76]

G. Exclusions

The State agrees that the specific exclusions listed in the proposed rule will provide increased clarity for regulators and the regulated community. This, in turn, may help streamline permitting by reducing the number of individual jurisdictional determinations that will have to be made. There are some exclusions, however, that need further clarification.

1. Groundwater

The regulatory reach of the CWA was not intended to be applied to the management and protection of groundwater. As such, the State appreciates the rule's exclusion of "groundwater, including groundwater drained through subsurface drainage systems."[77] Given the rule's use of "shallow subsurface hydrologic connections" to establish jurisdiction between surface waters, the State also appreciates the preamble's statement that "nothing…would cause the shallow subsurface hydrologic connections themselves to become jurisdictional."[78]

However, once codified, the preamble language regarding shallow subsurface hydrologic connections will not be published in the Code of Federal Regulations, leading to possible misinterpretations and confusion about your agencies' intent and the jurisdictional status of such waters. Therefore, the State requests that the groundwater exclusion in section (t)(5)(vi) of the rule be amended to state as follows:

> "Groundwater, including *but not limited to* groundwater drained through subsurface drainage systems *and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section*" (changes in italics).

Further, while EPA states it would not regulate the land on which "shallow subsurface water" flows, the practical effect would be to regulate both those groundwaters and the land on which they rest because it accommodates the flow, and it makes remotely connected waters jurisdictional when there may be no significant connection. Simply put, the CWA does not provide the federal agencies legal authority to use shallow-subsurface waters that are groundwaters regulated by the states as a means to assert CWA jurisdiction over waters not directly connected to downstream navigable waters.

2. Ditches

Regarding the exclusion of "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow," the State requests that the agencies clarify in a newly proposed rule that such ditches that drain uplands but eventually discharge to waters of the U.S. are not jurisdictional throughout the portion of the ditch that was excavated in uplands. The agencies should also include detail in the newly proposed rule that

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[76] 984 F. Supp. 2d 538 (E.D. Va. 2013).
[77] *Id.*
[78] *Id.* at 22210.

defines exactly where the line is between non-jurisdictional and jurisdictional sections of such ditches, as when a ditch does not contribute flow to a downstream navigable water, or when the flow will not contribute "significantly" to the water quality in a down-stream navigable water.

Finally, further clarity is needed in a newly proposed rulemaking that explicitly excludes stormwater collection and treatment systems from broad CWA jurisdiction. EPA already regulates discharges from certain stormwater systems to navigable waters under CWA 402.

Conclusion

EPA and the Corps should withdraw the proposed rule and draft Connectivity Report, and start promulgation of this important rulemaking anew in consultation with the states, as Congress required. The State of Alaska remains willing to collaborate with EPA and the Corps on developing regulations supported by credible science that will enhance CWA programs – several of which are administered by the State – while avoiding the crushing regulatory and economic burden the current proposed rule would impose. Constructive collaboration will help the state and federal agencies continue to protect and enhance our nation's waters, while also preserving states' primary rights and responsibilities over land and water uses, consistent with Congress' intent.

Sincerely,

Lynn J. Tomich Kent

for Larry Hartig
Commissioner

cc (via email):

The Honorable Lisa Murkowski, United States Senate
The Honorable Mark Begich, United States Senate
The Honorable Don Young, United States House of Representatives
Kip Knudson, Director of State/Federal Relations, Office of the Governor
Jo Ellen Darcy, Assistant Secretary of the Army (Civil Works)
Ken Kopocis, Deputy Assistant Administrator, EPA Office of Water

Enclosures:

Attachment 1 – December 16, 2013 Oral Testimony to SAB Panel
Attachment 2 – November 16, 2013 State Comments on EPA's Connectivity Study
Attachment 3 – October 1, 2014 Review by the Small Business Administration's Office of Advocacy Regarding the Economic Impact of the Proposed Rule on Small Businesses
Attachment 4 – Alaska Superimposed on Contiguous U.S.
Attachment 5 – Alaska Permafrost Map (Jorgenson, et al, 2008)

THE STATE of ALASKA
GOVERNOR SEAN PARNELL

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TESTIMONY TO SAB PEER REVIEW PANEL ON EPA's CONNECTIVITY STUDY

WASHINGTON, DC - DECEMBER 16, 2013

Good morning (afternoon). My name is Tom Crafford and I serve the State of Alaska as Director of the Office of Project Management and Permitting in the Department of Natural Resources.

My comments today augment those submitted by the State of Alaska on November 6 for this panel's review. The State's comments were compiled from reviews by multiple state agency technical professionals. I urge the panel to consider them in your deliberations as I can only cover a few key points in my testimony today.

Alaska is a long way from Washington DC. Alaskans are accustomed to seeing maps of the U.S. where Alaska appears as a miniature inset map distorting the size and location of our state. Even so, we were incredulous that Alaska, which hosts more wetlands than the rest of the combined U.S., was wholly omitted from the illustrations in the report. Coupled with the lack of information about wetlands and aquatic conditions common to northern latitudes, it's hard to discern how Alaska was considered in the connectivity report.

Permafrost, tundra, muskegs, boreal forest spruce bogs, glaciers, massive snowfields – these are features of our state that are uncommon or entirely absent in the rest of the country. The complex interconnections of groundwater in areas underlain by continuous and discontinuous permafrost, seasonal flooding at spring break-up, braided outwash rivers, and cold, low-nutrient streams are a few of the conditions that make Alaska unique.

Alaska's estimated 174 million acres of wetlands constitute about 65% of the nation's total and comprise about 43% of the state. That's an area larger than the next largest state, Texas. In fact, EPA considers all land north of the Brooks Range as tundra wetlands. Very few of our wetlands have been disturbed by man and vast acreages have been forever protected in federal Parks, Preserves, Refuges and Monuments as well as our State Park system.

Because of the remoteness and lack of developed overland access throughout most of the state, there is much about Alaskan waterbodies and wetlands we are still learning. We do know, however, that some methodology used to delineate wetlands per Army Corps of Engineers guidance doesn't work well in areas with undeveloped soils and where hydrology is often driven by seasonal freezing and flooding or permafrost.

The connectivity report makes reference to headwaters, perennial, intermittent and ephemeral waters. It introduces new terms such as "unidirectional" and "bidirectional" to describe connectivity of waters within a watershed. It commingles and interchanges terms that have been previously defined in wetland science, such as "riparian/floodplain wetland" and "riverine wetland". By introducing and defining new terms, the report compounds already complex terminology. The State recommends that EPA use terms and definitions that are long-established and accepted for scientific and technical analyses when discussing wetland connectivity.

The concept of a geographically isolated wetland where a surface water cannot be readily observed requires on-site, targeted data collection to determine the degree -- that is, the significance -- of connectivity. According to the report, the only truly isolated wetlands are completely surrounded by uplands. But not all wetlands, including wide swaths of permafrost tundra in Alaska that may be near but do not abut "waters of the U.S.", will have a demonstrated significant nexus.

We are concerned that this report has been written after the fact to support an already crafted proposed Clean Water Act jurisdictional rule. A draft of that rule was leaked in early November 2013, redefining and significantly expanding federal jurisdiction under the Clean Water Act. Alaska is no stranger to federal rules and policies which, written with the lower-48 in mind, are at best awkward and difficult to apply to Alaska.

In addition, the State of Alaska is currently evaluating whether it will assume Section 404 permitting, as states are entitled and Congress intended, under the Clean Water Act. If the connectivity report is used to support redefinition of "waters of the U.S." in a manner that would further limit those waters over which a state is entitled to assume jurisdiction under a state 404 program, or if the report and rulemaking make faulty assumptions about what waters and wetlands are – in the first instance – subject to Clean Water Act regulation, we have significant concerns with both the report and the pending rulemaking.

In closing, the state reviewers appreciated the effort behind the report as a literature review. However, the report lacks studies relevant to interior and arctic Alaska, and it appears to assume, as a rule, that connectivity is significant, even when such an assumption is unsupported. This results in a massive expansion of waters and wetlands that would be subject to Clean Water Act regulation. These and other weaknesses in the report undermine its effectiveness if it's to inform a truly nationwide rulemaking process.

THE STATE of ALASKA
GOVERNOR SEAN PARNELL

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November 6, 2013

VIA EMAIL & CERTIFIED MAIL

Dr. Thomas Armitage, Designated Federal Officer (DFO)
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U.S. Environmental Protection Agency
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Washington, DC 20460
via email at armitage.thomas@epa.gov

Office of Environmental Information (OEI) Docket (Mail Code 28221T)
Docket # EPA-HQ-OA 2013-0582
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
ORD.Docket@epa.gov

Re: State of Alaska Comments on EPA's draft report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (September, 2013 External Review Draft, EPA/600/R-11/098B)

Dear Dr. Armitage:

The State of Alaska has reviewed the U.S. Environmental Protection Agency's (EPA) draft report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (September, 2013 External Review Draft, EPA/600/R-11/098B) (hereinafter the "Report") that EPA publicly noticed in the Federal Register on September 24, 2013. EPA imposed a short public review period on the Report, stating that public comments had to be submitted by November 6, 2013 if commenters were to expect EPA to provide

their comments to the Science Advisory Board (SAB) expert review panel that is reviewing the Report.

As you know, for the benefit of the SAB external review panel as well as the public, the State requested that EPA extend the public review and comment period for an additional 90 days, but EPA denied that request. The State remains very concerned about the lack of adequate time allowed for state regulatory agencies to review this document and the information it relies upon. EPA has failed to make many of the documents underlying the Report available, which makes it extremely difficult, if not impossible, to adequately critique the Report. Nonetheless, the State provides the following and enclosed comments.

The State also nominated two scientists familiar with Alaska hydrology to sit on the external review panel, and one was selected along with a federal agency scientist from Alaska. We appreciate their representation on the panel. But because this Report is informing federal rulemaking that will be implemented by the states, the addition of a scientist from a state regulatory agency could have served those interests in the external review.

Background

The EPA Report is a synthesis of peer-reviewed scientific literature on the connectivity of streams and wetlands. The Report consists of 331 pages and it references over 1000 technical sources. It is a large-scale review that relies upon a broad array of scientific literature documenting research conducted nationwide and indeed worldwide. However, the Report lacks Alaska-specific information and references.

EPA summarizes three major conclusions reached in the Report:

1) scientific literature demonstrates that streams have a strong influence on the character and function of downstream waters;

2) wetlands and open waters in landscapes that are connected such that hydrological flow occurs into and out of the wetland or open water (bidirectional hydrologic exchanges) are physically, chemically, and biologically connected with rivers; and

3) wetlands in landscapes that lack bidirectional hydrologic exchange (isolated wetlands such as prairie potholes, vernal pools, etc.) provide numerous functions that can benefit downstream water quality. There are three chapters where scientific literature is used to support these conclusions. The study explores the three main methods of stream and wetland connection (physical, chemical, and biological).

While the study explores the three main methods of stream and wetland connection (physical, chemical, and biological) and discusses hundreds of scientific studies, the Report does not explain how waters and wetland systems that may be hydrologically connected demonstrate a significance nexus.

Technical Comments and Concerns:

The Report uses very general terms (such "most", "all", "numerous", "typically", among others) to apply a specific study to a broader category of wetlands. Terms that are commonly used during the regulatory process were used in the Report, but with slightly different definitions (e.g., "upland" and "isolated"). Most important for Alaska, there is very little or no discussion of wetland types and northern latitude conditions that are the most common in Alaska (for example permafrost, tundra, muskegs, and boreal forest spruce bogs). In addition, Alaska has approximately 65% of the nation's total wetlands (estimated at 174 million acres) comprising about 43% of Alaska's surface area. Many of these wetlands are in areas with no man-made disturbance.

This Report introduces new terms such as "unidirectional" and "bidirectional" to describe connectivity of waters within a watershed. The Report commingles and interchanges terms that have been previously defined in wetland science, such as "riparian/floodplain wetland" and "riverine wetland". By introducing new terms and creating a definition for them the Report essentially compounds the already complex nature of wetland designation and terminology. The State recommends that EPA use terms and definitions that are long-established and accepted for scientific and technical analyses when deliberating and using these terms when discussing wetland connectivity.

Page-specific technical comments compiled from hydrologists and other scientists at the Alaska Departments of Natural Resources and Environmental Conservation are attached to this letter. Below are some of the key observations summarized from these comments:

- Lack of Alaska specificity

Little of the referenced research was conducted in Alaska and the wetlands types on which it focuses are not representative of the wetlands typically found in Alaska. The maps and illustrations in the study do not even depict Alaska and the limited references in the text to Alaska focus on the biological, not hydrological, connections of streams and wetlands such as the dispersion of nutrients by wildlife feeding on salmon.

- Case studies are from areas much more impacted than Alaska

Case studies, and indeed much of the cited literature, refer to areas that have been heavily impacted by man-made changes. Agricultural and silvicultural activities: dams and other barriers to and moderators of flow; road and culverts; urbanization and channeling of natural waterways; groundwater withdrawal and use; stormwater collection systems; and discharged effluents from wastewater treatment plants have altered the landscape throughout most of the United States. Research conclusions from impacted watersheds reflect the disturbance of the natural hydrologic cycles. The next iteration of the Report should highlight studies done in experimental or otherwise non-impacted watersheds to show interconnections of water bodies and wetlands in healthy ecosystems. We have listed several references in the attached table that could direct EPA and the SAB external review panel to studies conducted in Alaska.

- Geographically isolated waters and wetlands

The concept of a geographically isolated wetland where a surface water cannot be observed requires on-site specific data collection to determine the degree -- that is, the significance -- of connectivity. According to the Report, the only truly isolated wetlands are completely surrounded by uplands. But not all wetlands, including wide swaths of permafrost tundra in Alaska that may be near but do not abut "waters of the U.S.", will have a demonstrated significant nexus.

Potential policy implications of the Report:

On September 17, 2013, or perhaps even earlier, EPA sent to the White House Office of Management and Budget (OMB) a proposed rule that apparently provides EPA's proposed process for determining federal jurisdiction under the Clean Water Act. This proposed rule, rumored to be based largely on controversial draft guidance that EPA circulated in 2011, is being fast-tracked through OMB review, when the report that EPA clearly intends to rely upon to buttress the rule has not been reviewed by the external panel nor subjected to rigorous public review and state-federal consultation. Thus, Alaska is concerned that the Report is *post hoc* justification for policy that has already been developed, regardless of the contents of the Report, future versions of it, or the deliberations of the SAB external review panel.

This Report and a final rulemaking will likely significantly expand the reach of federal jurisdiction by expanding the definition of "waters of the U.S." to include wetlands and other isolated water bodies over which, because of multiple Supreme Court rulings, the federal government does not currently have clear jurisdiction. The State of Alaska's primary concern is that the rulemaking will

lead to most, if not all, isolated or nominally hydrologically connected waters and wetlands being classified as "waters of the U.S". even though no significant nexus has been demonstrated by virtue of the Report. Such results clearly would encroach on state regulatory prerogatives.

The Report may be used to exert CWA jurisdiction over more and more types of water bodies and wetlands than are now regulated. The Report was apparently commissioned by EPA to bring clarity to thorny regulatory issues regarding connections of subsurface flow, streams and certain wetlands with larger, downstream navigable waters. The issue concerning the reach of federal jurisdiction left unresolved in *Rapanos v. United States*, 547 U.S. 715(2006) remains problematic if rulemaking is informed by this Report. Moreover, the State believes that any scientific review used to underpin the process for making federal jurisdictional determinations must be completed before a draft rule is prepared by the agencies.

In closing, the state reviewers were impressed with the Report as a literature review of the science of connectivity of waters. It is based on apparently peer-reviewed science, but lacks studies conducted in or relevant to interior and arctic Alaska and therefore has limited applicability in Alaska. This is a key weakness in this Report and undermines its effectiveness in being used in a rulemaking process that will apply nationwide. Notwithstanding this deficiency, if the federal agencies feel compelled to use the Report to buttress the process they propose for determining "waters of the U.S.", the State believes that it would violate the CWA for the EPA and Corps to use that same jurisdictional process for determining those waters and wetlands which states may assume under CWA §404(g)(1). Such application of that process would be contrary to the regulatory directive Congress gave for state-managed §404 programs [*see e.g.* 33 USC §§1251(b) and 1344(g)(1)]. As part of the assumption process, determining assumable vs. non-assumable waters is merely an administrative tool that is used to create a seamless state/federal sharing of permitting responsibilities under the CWA.

With these important caveats, the State of Alaska looks forward to the recommendations of the SAB external review panel, the next iteration of the document, and opportunities to comment on rulemaking.

Sincerely,

Tom Crafford, Director

cc: Via Email & First Class Mail:

EPA Region 10 Administrator Dennis McLerran
EPA Region 10, Alaska Region Director Dianne Soderlund
Alaska Governor Sean Parnell
DNR Acting Commissioner Joe Balash
DEC Commissioner Larry Hartig
ADF&G Commissioner Cora Campbell
Alaska Attorney General Michael Geraghty
Senator Lisa Murkowski
Senator Mark Begich
Congressman Don Young

Attachment: Table of page-specific technical comments

State of Alaska technical comments: EPA Connectivity of Streams and Wetlands to Downstream Waters
(EPA External Review Draft September 2013)

Doc Page Number (e.g. 3-21)	Line No.	General subject area (e.g physical, chemical and biologic waterbody attributes, conceptual model, etc)	
			General – Comments on document as a whole, elements missing, etc.
			This study focuses on the connectivity of streams and wetlands to downstream waters and, as part of the water cycle, but fails to look at the entire system; it only addresses the wetlands-to-downstream water connections, but not the stream/wetlands-to-upland connections. Upland disturbances (e.g. pavement, agriculture etc.) cause problems that alter the characteristics of downstream waters, and the wetlands are needed to correct for the up-gradient changes. (Physical: e.g. floods from paved surfaces, Chemical: e.g. nutrient from feedlots, etc.). This means that wetlands are mainly valuable in areas where they provide this important ecological service of flood control and purification for upstream factors. Wetlands are of less value in areas where upstream activities/impacts are absent or not significant. The focus of the report should include the entire hydrological cycle and focus on areas where unwanted changes are or could be happening in the future. Wetland systems, either natural or manmade (e.g. rain gardens), can be used to reduce the unwanted impacts of upstream activities.
			The document speaks about ephemeral streams and expanding flow networks after rain events, but does not address unpaved surfaces such as parking lots and paved surfaces (e.g. urban areas) that have a vast network of storm drains that should be included in the ephemeral streams concept. The unpaved surfaces contribute to flooding downstream and these storm water floods carry numerous contaminants. Manmade storm water basins and wetlands can be very effective in reducing flood potential and removing contaminants.
		Geographic/regional	References cited in the report which contain subject matter pertinent to the State of Alaska are predominately focused on the southern portions of the State and coastal areas. Although a large portion of Alaska's population is centered in the southern regions, geographically the northern latitudes and interior portions of the State are significant for several reasons, including endangered species habitat, subsistence land use, economic activity, unique thermal/hydrologic systems, and the sheer spatial scale. For instance Hall et al. 1994, reported the interior, arctic, and western regions of the state account for over 90% of the state's 174 million acres of wetlands (approximately 60% of the nation's wetlands as a whole for comparison [Hall et al. 1994]). The majority of the wetlands included in these regions would be classified as Palustrine scrub/shrub and emergent wetlands, commonly cited and referred to as tundra. These areas are generally associated with continuous and discontinuous permafrost and large terrestrial carbon stores (e.g. Oechel et al., 1993, Zimov et al., 2006). Hall, J. V., Frayer, W. E., & Wilen, B. O. (1994). Status of Alaska wetlands. Oechel, W. C., Hastings, S. J., Vourlrtis, G., Jenkins, M., Riechers, G., & Grulke, N. (1993). Recent change of Arctic tundra ecosystems from a net carbon dioxide sink to a source. *Nature*, *361*(6412), 520-523.

Doc Page Number (e.g. 3-21)	Line No.	General subject area (e.g physical, chemical and biologic waterbody attributes, conceptual model, etc)	
			Zimov, S. A., Schuur, E. A., & Chapin III, F. S. (2006). Permafrost and the global carbon budget. *Science(Washington)*, *312*(5780), 1612-1613. Although hydrologic settings and processes described within the EPA's literature review may accurately describe some aspects of the physical hydrologic processes included in arctic and subarctic systems, an elucidation of how northern latitude systems apply within the document would be beneficial to the overall breadth of material in the review, and to the scope of the EPA's objective in commissioning this report. Many studies focusing on these physical processes, including arctic/subarctic wetlands or tundra ecosystems have been conducted and are too numerous to list here, but a few examples are listed below: 1) R.J. Rovansek, L.D. Hinzman, D.L. Kane. 1996. Hydrology of a Tundra Wetland Complex on the Alaskan Arctic Coastal Plain, U.S.A. *Arctic and Alpine Research*, 28:3. 2) N.T. Roulet, M. Woo. 1986. Hydrology of a Wetland in the Continuous Permafrost Region. *Journal of Hydrology*, 89:1-2. 3) N.T. Roulet, M. Woo. 1986. Wetland and Lake Evaporation in the Low Arctic. *Arctic and Alpine Research,* 18:2. 4) L.D. Hangman, D.L. Kane, R.E. Gieck, K.R. Everett. 1991. Hydrologic and Thermal Properties of the Active Layer in the Alaskan Arctic. *Cold Regions Science and Technology,* 19:2. 5) J. Brown, S.L. Dingman, R.I. Lewellen. 1968. Hydrology of a Drainage Basin on the Alaskan Coastal Plain. *Cold Regions Research & Engineering Laboratory, New Hampshire.* 6) R.B. Stewart, W.R. Rouse. 1976. Simple Models for Calculating Evaporation from Dry and Wet Tundra Surfaces. *Arctic and Alpine Research,* 8:3. 7) W.R. Rouse, P.F. Mills, R.B. Stewart. 1977. Evaporation in High Latitudes. *Water Resource Research.* 13:6. 8) J. Ford, B.L. Bedford. 1987. The Hydrology of Alaskan Wetlands, USA: A Review. *Arctic and Alpine Research,* 19:3. 9) S.L. Dingman, R.G. Barry, G. Weller, C. Benson, E.F. LeDrew, C.W. Goodwin. 1980. Climate, snow cover, microclimate and hydrology. *In* J. Brown, P.C. Miller, L.L. Tieszen, F.L. Bunnell, *eds. An Arctic ecosystem: the coastal tundra at Barrow, Alaska.* Stroudsburg, PA, Dowden, Hutchinson and Ross, 30-65.
			This study introduces new terms such as "unidirectional" and "bidirectional" to describe connectivity of waters within a watershed. This study often mixes and interchanges terms that have been previously defined, such as riparian/floodplain wetland and riverine wetland. By introducing new terms and creating a definition for them, the report essentially compounds the already complex nature of wetland science. It is recommended that the study look to the current literature for terms and definitions that have already been established and use these terms when discussing wetland connectivity.

State of Alaska technical comments: EPA Connectivity of Streams and Wetlands to Downstream Waters
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Doc Page Number (e.g. 3-21)	Line No.	General subject area (e.g physical, chemical and biologic waterbody attributes, conceptual model, etc)	
			Chapter 1 – Executive Summary
1-3	12	Generalized conclusion	Suggest removing the word "All" as literature does not support "all".
1-4	30	Materials in rivers	Add " ice" as a material in rivers. It has a significant geomorphic role in shaping Alaska rivers.
	33	What effects rivers	Therefore, Streams (Glaciers) and wetlands…..
1-4,5	39-9	Definition of Connectivity	Suggest moving this section closer to the beginning, suggest to move it to P1-1, line 14
1-6	15	Explanation of Nitrogen	The line "a nutrient that can be a contaminant when present in high concentrations" can be removed.
1-6	13-22	Potential function	Potential wetland function for future use as contaminant and flood reduction mechanisms should be tied to the likelihood of upland development, land use type, climate, precipitation potential, and climate change impacts. Simply stating that a wetland will be useful in the future is not sufficient because there are situations where large numbers of wetlands are associated with a small upland area, meaning that a small number of those wetlands would provide enough ecological service to balance the upland disturbance potential.
1-6	21-22	Potential Function	The last sentence should be struck from the study as this is not a synthesis of scientific literature, but rather a policy driven statement. Protecting waters from future use based on "potential functions" has no basis in the literature cited. How could "potential function" of a wetland be measured or analyzed? Current wetland functional assessments are based on "actual functions".
1-9	2-7	Consider revising	"Export of channel forming sediment and woody debris" - why only export if this is a bidirectional wetland; "they remove and transform excess nutrients" – They can also add nutrients to the stream. "Storage of local groundwater" is confusing, because incoming surface water is stored in the wetland while it is likely exported as groundwater.
1-9	9-12	Consider revising	There is no general rule that determines that all forms of flooding, sedimentation, nutrients, and contaminants (also add carbon) are bad for downstream waters; these processes (except most contaminants) can also provide new habitat for endangered species through exposure of new gravel beds and creation of deep pools or local stream sections that have a different shading regime. If the same water standards are used under all circumstances, then most extreme conditions would be considered "bad," including low flow as well as flooding.
1-14	5-7	Geographically Isolated wetlands	The concept of a geographically isolated wetland where a surface water cannot be observed requires on-site specific data collection to determine the degree of connectivity. This will require states and regulators to review each geographically isolated wetland on a case-by-case basis and will therefore cause expense as well as, potentially, elevations and delays.

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Doc Page Number (e.g. 3-21)	Line No.	General subject area (e.g physical, chemical and biologic waterbody attributes, conceptual model, etc)	
			Chapter 2 – Introduction
2-1	19-20	CWA Jurisdiction	The scientific literature review for discussing connectivity should not interject "legal standards for CWA jurisdiction" into the discussion. This only leads to confusion and appears to make a policy statement based on a scientific literature review.
			Chapter 3 – Effects of Streams and Wetlands on Downstream Waters: A Conceptual Framework
3-1	5	Wrong word choice	The second time the word "integrate" is used it does not have the mathematical intent it had the first time the word was used, it is therefore preferable to use the word "relates" in the second occurrence. "Spatial integration" implies a mathematically-derived volume that is not meant in this context.
3-6	2-14	Definition of a wetland	This study introduces two definitions of a wetland, Cowardin and the Federal regulatory definition. According to the study an area can be defined as a wetland when one of the three Cowardin attributes have been met. The reference to the federal regulatory definition of a wetland does not appear to have any merit to the discussion in the study as the report does not use the federal regulatory definition of a wetland. The use of regulatory citations is not necessary and only confuses the reader by making it appear that the definition the authors chose to use for a wetland is supported by regulation. Again, this is an example of using a definition for the study that is not consistent with current wetland management. Regulatory definition of wetlands does not allow for the determination of an area as a wetland by passing only one of the three Cowardin attributes. The broader definition in the study applies the term "wetland" to a lot of areas that would not be defined as a "wetland" using the federal regulatory definition, thus creating an unnecessary level of confusion and misunderstanding.
3-10	24	Wrong word	"Well" should be replaced by "piezometer". The word "well" is used typically for a fully screened borehole whereas a piezometer is only screened at a particular depth interval. In a confined aquifer this is always a piezometer.
3-12	6	explain	"Previous subsurfaces" needs explanation
3-16	28-35	River Network Expansion and Contraction	This section uses a generalization of hydrology based on conditions in the contiguous 48 states (as depicted in the accompanying figures), however riverine hydrology in Alaska cannot be generalized this way as there are larger glacially-fed riverine systems that have higher flows during warmer, drier periods as opposed to a cool wet season as is the case in Oregon. Alaska river hydrology is more likely to be impacted by snowmelt rates and glacial melt than high rates of precipitation.
3-21	19	New term	"riverine wetland" is a new term introduced. This is a Cowardin term, and does not match with the riparian/floodplain wetland definition that was provided earlier in the study. The Study should either define "riverine wetlands" or use the previously defined term.
3-22	15-17	Statement needs revision	If groundwater levels in the wetland are artesian and levels are above the flooding river stage, water cannot infiltrate. Groundwater levels do not dictate flow, but groundwater level gradients do. If the potentiometric surface drops with elevation drop, then water infiltrates; if the potentiometric surface rises with elevation drop, then groundwater seeps out of the ground.

Doc Page Number (e.g. 3-21)	Line No.	General subject area (e.g physical, chemical and biologic waterbody attributes, conceptual model, etc)	
3-27	5	Potential function	The term "potential function" is used again. Measuring the "potential function" of denitrification in a wetland that may never have nitrogen imported into the system appears to be a difficult assessment. "What if" scenarios make management of these resources virtually impossible.
3-33	20	Section 3.4.1 Climate-Watershed Characteristics	This section is void of any discussion of glacial systems and impacts to melting ice. There is a very brief discussion on snowmelt. Northern climates such as in Alaska are quite unique and not discussed in this section of the study.
			Chapter 4 – Streams: Physical, Chemical and Biological Connections to Rivers
4-11		Paragraph 4.3.3	A paragraph should be devoted to woody debris that is transported along the bottom of the river (as opposed to floating woody debris). Research on kinematic hydro power generation shows that the wood causes problems with moving components of a generator system.
4-13		Paragraph 4.3.4 Add this text concerning permafrost related groundwater flow and temperature	The presence of permafrost (ground below 0˚C for more than 2 consecutive years) commonly creates artesian groundwater flow in narrow stream valleys (Williams 1970), because permafrost is an impermeable barrier to groundwater flow (Callegary et.al. 2013). This water is typically just above freezing (Yoshikawa 1993). It is prevented from freezing by the geothermal gradient underneath the watershed, which is offset by the mean annual ground surface heat flow (Romanovsky and Osterkamp 1995). Regional groundwater flow alters the geothermal heat flux in many cases (Deming 1993). In the case of narrow valleys, gravels are commonly present in the deepest portion of the unconsolidated materials and can carry water, but only if the permafrost is not deep enough to block the flow (Williams 1970). Thermal processes in the ground are complex near the ground surface due to seasonal freezing and thawing. Artesian groundwater flow only adds to this complexity. Larger, more concentrated springs maintain flow all winter long and can create large ice deposits on the surface called aufeis (Yoshikawa et.al. 2006). These deposits are found throughout Alaska where mean annual air temperatures are below -10˚C, including the North Slope (Kane et.al. 2013).
4-13	31	replace	"that affect" with "in"
4-21		Paragraph 4.4.2 Add a section on carbon storage in permafrost	Large carbon pools are present in permafrost-controlled landscapes (Tarnocai et.al. 2009). Low temperatures and anoxic conditions in frozen ground preserve this carbon over time. However, warming atmospheric conditions in the northern regions have led to widespread degradation of permafrost (Jorgenson et.al. 2010) and DOC release to surface water (O'Donnell et.al. 2012). Additional DOC from warming soils will likely add to the aquatic food chain of streams and rivers throughout Alaska in the coming decades. These changes could alter community structures due to shifting energy supplies in these systems (Jansson et.al. 2000).
4-26		Paragraph 4.4.4	There is no discussion on dissolved or suspended organic contaminants in this paragraph (hydrocarbons, pesticides, herbicides, etc.); they often behave differently than other contaminants due to bioaccumulation and adsorption to other organic matter.

Doc Page Number (e.g. 3-21)	Line No.	General subject area (e.g physical, chemical and biologic waterbody attributes, conceptual model, etc)	
4-29		Paragraph 4.5	Large springs from sub-permafrost groundwater (see section 4.3.4) provide a thermal shelter for overwintering fish on the North Slope of Alaska. Many streams and some rivers in this region freeze completely to the bed during the winter months. Only deep water bodies and springs remain as liquid water for fish to survive in.
			Chapter 5 – Wetlands: Physical, Chemical and Biological Connections to Rivers
5-1	4	Consider revising	Suggest adding "generally" in front of transitional ecosystems as not all wetlands are transitional ecosystems.
5-3	24-34		Most scientific peer-reviewed literature that was reviewed for riparian and floodplain areas did not specify the area as a wetland. However, the study surveyed the "riparian literature broadly and included any results and conclusions that we judged were pertinent to riparian/floodplain wetlands." This does not seem consistent with the intent of the study.
5-5		Baseflow	Table 5-1 point 5: Stored water does not just return as base flow to the stream, it also returns as normal flow after water levels in the stream recede. Only the portion of the water that remains in the wetlands when the stream is near its lowest level will add to baseflow.
5-6		Paragraph 5.3.1.1 Add permafrost and ice flows as physical interactions	Riparian areas in the discontinuous permafrost zone, (permafrost present in 50-90% of the area) are more likely to form permafrost than other areas in the region. This is because of the following reasons: 1) saturated areas conduct more heat in winter than in summer, resulting in a thermal offset that favors freezing; 2) wet ecosystems support the development of a moss cover and peat layer, further enhancing the thermal offset; 3) vegetation structures such as tussocks and small coniferous trees provide additional cooling in winter through snow pack manipulation. The vegetation causes the snow pack to be discontinuous and holes provide opportunities for thermal convection and therefore rapid cooling of the ground underneath the snow cover. Development of this permafrost layer affects groundwater movement by obstructing subsurface drainage/seepage and favoring flow directly into the unfrozen river bed. Groundwater flow directly into the river bed alters the geothermal heat flow and further reduces the heat input into this zone. The presence of the permafrost layer cuts the direct groundwater connection between the river and the riparian wetlands in permafrost regions, but connects the river with groundwater from upland areas that might have otherwise surfaced in the wetland. Climate change has in many cases already affected the permafrost in the discontinuous permafrost zone, leading to the widespread development of thermokarst (Jorgenson et.al. 2001). This thermokarst can open a connection between surface water and groundwater (Yoshikawa et.al. 2006). In the continuous permafrost zone (permafrost present in >90% of the area) permafrost can be much deeper, e.g. ~600 m in northern Alaska. Only large rivers can have an open talik (unfrozen zone) to sub-permafrost groundwater (Kane et.al. 2013). Riparian areas in the continuous permafrost zone are not likely to lose permafrost in the next century, but taliks can form in the upper part of permafrost and create a perched groundwater aquifer. Permafrost also affects local ground surface elevation due to massive ground ice formation. There is evidence that entire riparian zones have uplifted (inflated) during the Little Ice Age due to massive ground ice development (Jorgenson et.al. 2007).

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			On a smaller scale the ground surface can move up and down on an annual basis due to frost heave in the Arctic tundra (Daanen 2012). These elevation changes influence drainage patterns and runoff amounts in ice wedge polygon networks such as those at Barrow, Alaska (Liljedahl et.al. 2012).
5-7		Paragraph 5.3.1.2 Add ice flows in geomorphology dynamics	In Arctic regions river ice plays an important role in river dynamics and river bed evolution, primarily through spring flooding events. Most lakes and rivers freeze deeper than a meter and during spring this ice is forced to flow with the river as water levels rise due to snowmelt. During some years ice is moved beyond the river bank, disturbing riparian vegetation and scouring the river banks. River ice can also pick up large boulders from the river bed and deposit them in riparian areas. Glacial rivers transport large amounts of sediment, causing the broad river bed to be virtually devoid of vegetation. Braided river systems are typically open- river systems where ice and ice dams play an important role every spring in scouring the river bed, cutting new channels or closing old ones, and even removing vegetation.
5-12	4	Insert line	
5-23	35	Add text	In the list add "the presence or absence of permafrost"
5-24	14	Add text	In the list add "the presence or absence of permafrost"
5-28	22	Change text	"boreal" to "Laurentian mixed"
5-29	13	Add text	Degradation of permafrost in riparian areas can also lead to increased release of DOC (O'Donnell et.al. 2012) (see section 4.4.2).
5-37	32	Change text	"all" to "most"
5-37	33	Delete text	"; this is why the water cycle environment is referred to as the hydrosphere"
5-38	1	Delete text	" The purpose of this review is to determine, based on the peer reviewed literature, the degree of connectivity and associated affects between different unidirectional wetlands and downstream waters." This sentence is not correct, because this connectivity is unique for each wetland and can only be determined on an individual basis by experts. Each unidirectional wetland has potentially a different relation with downstream waters, especially the isolated ones. To say that this relation can be determined with a literature review is misleading; at best we can speculate that there is a connection if no research was done on the connectivity. (also see section starting on line 30, p5-40)
5-40	29	Add text	" Especially regions with permafrost where the hydrological connectivity depends directly on the temperature of the ground."

SBA Office of Advocacy
www.sba.gov/advocacy

Advocacy: the voice of small business in government

October 1, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Maj. Gen. John Peabody
Deputy Commanding General
Civil and Emergency Operations
U.S. Army Corps of Engineers
Attn: CECW-CO-R 441 G Street, NW
Washington, D.C. 20314-1000

Re: Definition of "Waters of the United States" Under the Clean Water Act [1]

Dear Administrator McCarthy and Major General Peabody:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments regarding the proposed rule to the U.S. Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA, and together, "the agencies"). Advocacy believes that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act (RFA) because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking.

The Office of Advocacy and the Regulatory Flexibility Act

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so our views do not necessarily reflect those of SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[2] requires small entities to be considered in the federal rulemaking process. The RFA requires federal agencies to consider the impact of their proposed rules on small businesses. When a rule is expected to have a significant economic impact on a substantial number of small entities, agencies must evaluate the impact, consider less

[1] Definition of Waters of the United States Under the Clean Water Act, 79 *Fed. Reg.* 22188 (April 21, 2014).
[2] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

burdensome alternatives, and in the case of EPA, convene a Small Business Advocacy Review panel.[3] The RFA directs Advocacy to monitor agency compliance with the RFA. To this end, Advocacy may file written comments reflecting small business concerns about the impact of a rulemaking.[4] Because of small business concerns with the proposed rule, Advocacy held a roundtable on July 21, 2014 and has heard from numerous small entities in many industries.

Background

The Clean Water Act (CWA) was enacted in 1972 to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[5] The CWA accomplishes this by eliminating the "discharge of pollutants into the navigable waters."[6] The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas."[7] Existing regulations currently define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.[8]

The CWA requires a permit in order to discharge pollutants, dredged, or fill materials into any body of water deemed to be a "water of the United States."[9] The EPA generally administers these permits, but EPA and the Corps jointly administer and enforce certain permit programs under the Act.[10]

The extent of the Act's jurisdiction has been the subject of much litigation and regulatory action, including three Supreme Court decisions. Actions of the Court have expanded and contracted the definition, especially regarding wetlands and smaller bodies of water.

- In 1985, the Supreme Court determined that adjacent wetlands may be included in the regulatory definition of "waters of the United States."[11]
- In 2001, the Court held that migratory birds' use of isolated "nonnavigable" intrastate ponds was not sufficient cause to extend federal jurisdiction under the CWA.[12]
- In 2006, the Supreme Court considered whether wetlands near ditches or man-made drains that eventually empty into traditional navigable waters were

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[3] 5 U.S.C. § 603, 605.
[4] The Small Business Jobs Act of 2010 (Pub. L. 111-240 § 1601) also requires agencies to give every appropriate consideration to Advocacy's written comments on a proposed rule. This response must be included in an explanation or discussion accompanying the final rule's publication in the *Federal Register* unless the agency certifies that the public interest is not served by doing so.
[5] 33 U.S.C. § 1251(a) (1972).
[6] Id. at § 1251(a)(1).
[7] Id. at § 1362(7).
[8] 33 C.F.R. § 328.3(a); 40 C.F.R. §230.3(s).
[9] 33 U.S.C. §§ 1311(a), 1342, 1344.
[10] Id. at § 1344.
[11] *United States v. Riverside Bayview Homes,* 474 U.S. 121, 134-135 (1985).
[12] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159, 174 (2001).

considered "waters of the United States."[13] Justice Scalia, writing for the plurality, determined that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' [. . .] are 'adjacent to' such waters and covered by the Act."[14] Justice Kennedy concurred in the judgment, but concluded that the Corps must establish the existence of a "significant nexus" when it asserted jurisdiction over wetlands adjacent to non-navigable tributaries.[15]

The courts have left much uncertainty regarding what constitutes a "water of the United States." Such uncertainty has made it difficult for small entities to know which waters are subject to jurisdiction and CWA permitting.

To address this uncertainty, the EPA and Corps proposed this rule which would revise the regulatory definition of "waters of the United States" and would apply to all sections of the Clean Water Act. The proposed rule defines "waters of the United States" within the framework of the CWA as the following seven categories:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.[16]

The proposed rule defines several terms for the first time: "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus"; and it clarifies the terms, "adjacent" and "wetlands."[17] The rule leaves the regulatory definitions of "traditional navigable waters," "interstate waters," "the territorial seas," and "impoundments" unchanged.[18]

Regulatory Flexibility Act Requirements

The RFA states that "[w]henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or

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[13] *Rapanos v. United States,* 547 U.S. 715, 729 (2006).
[14] Id. at 742.
[15] Id. at 779 (Kennedy, J., concurring).
[16] 79 *Fed. Reg.* at 22,198.
[17] See Id. at 22,263, for the complete definitions of "adjacent," "neighboring," "riparian area," "floodplain," "tributary," "wetlands," and "significant nexus."
[18] Id.

publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis [IRFA]. Such analysis shall describe the impact of the proposed rule on small entities."[19]

Under Section 609(b) of the RFA, EPA is required to conduct small business advocacy review panels, often referred to as SBREFA panels, when it is unable to certify that a rule will not have a significant economic impact on a substantial number of small businesses. SBREFA panels consist of representatives of the rulemaking agency, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), and the Chief Counsel for Advocacy. SBREFA panels give small entity representatives (SERs) a chance to understand an upcoming proposed rule and provide meaningful input to help the agency comply with the RFA. SERs help the panel understand the ramifications of the proposed rule and significant alternatives to it.

Section 605(b) of the RFA allows an agency to certify that a rule will not have a significant economic impact on a substantial number of small entities in lieu of preparing an IRFA.[20] When certifying, the agency must provide a factual basis for the certification.[21] In the current case, the agencies have certified that revising the definition of "waters of the United States" will not have a significant economic impact on a substantial number of small businesses.

The Proposed Rule Has Been Certified in Error

Advocacy believes that the agencies have improperly certified this rule. Advocacy, and the small businesses we have spoken to, believe that

- The agencies used an incorrect baseline for determining their obligations under the RFA;
- The rule imposes costs directly on small businesses; and
- The rule will have a significant economic impact on small businesses.

A. The Agencies Use the Incorrect Baseline for its Regulatory Flexibility Act Certification

Advocacy believes that the agencies used the wrong baseline for their RFA certification. In certifying the rule, the agencies state that, "This proposed rule is narrower than that under the existing regulations…fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations."[22] On this

[19] 5 U.S.C. §603.
[20] 5 U.S.C. §605.
[21] Id.
[22] Id.

basis the agencies conclude that, "This action will not affect small entities to a greater degree than the existing regulations."[23]

The "existing regulations" that the agencies refer to in this reasoning is the 1986 rule defining the scope of waters of the United States. Compared to the 1986 definition, the proposed changes represent a narrowing of coverage. However, in the economic analysis accompanying the rule, the agencies assess the regulation vis-à-vis current practice and determine that the rule increases the CWA's jurisdiction by approximately 3 percent.[24] The agencies' certification and economic analysis contradict each other.

Advocacy believes that the proper baseline from which to assess the rule's impact is current practice. Guidance from the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) substantiates this view. OIRA's Circular A-4 provides guidance to federal agencies on the development of regulatory analysis.[25] It states that "The baseline should be the best assessment of the way the world would look absent the proposed action."[26] The 1986 regulation has been abrogated by several Supreme Court cases and is no longer in use.[27] The Corps and EPA also issued a guidance document in 2008 which sought to bring jurisdictional determinations in line with these Supreme Court cases.[28] The 1986 regulation does not represent the current method for determining jurisdiction and has not served that purpose for more than thirteen years. Using an obsolete baseline improperly diminishes the effects of this rule. Advocacy agrees with the agencies' economic analysis that uses current practice as the appropriate baseline for evaluating the rule.

B. The Rule Imposes Costs Directly on Small Businesses

The second basis for the certification appears to be the agencies' position that the impact on small businesses will be indirect, hence not requiring an initial regulatory flexibility analysis or a SBAR panel.[29] EPA cites *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission*[30] and *American Trucking Associations, Inc., v. EPA*[31] in support of their certification.[32] Advocacy believes that the agencies' reliance on *Mid-Tex* and *American Trucking* is misplaced because the proposed rule will have direct effects on small businesses.

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[23] Id.
[24] Id.
[25] Office of Management and Budget, *Circular A-4*, http://www.whitehouse.gov/omb/circulars_a004_a-4/#e (September 17, 2003).
[26] Id.
[27] See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159, 174 (2001); *Rapanos v. United States,* 547 U.S. 715, 729 (2006).
[28] Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*, December 2, 2008, http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm .
[29] 79 *Fed. Reg.* at 22,220.
[30] *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission (FERC),* 773 F.2d 327, 342 (D.C. Cir. 1985).
[31] *American Trucking Associations v. EPA,* 175 F.3d 1027 (D.C. Cir. 1999).
[32] 79 *Fed. Reg.* at 22,220.

In *Mid-Tex*,[33] the Federal Energy Regulatory Commission (FERC) issued regulations instructing generating utilities how to include costs of construction work in their rates. Although the generating utilities were large businesses, their customers included small entities, to whom they may or may not have been able to pass on these costs through any rate changes.[34] The issue raised in this case was whether the agency had improperly certified the rule because it failed to consider the impact on the small business customers. The court concluded that an agency is required to file an IRFA only in cases where a regulation directly affects small businesses;[35] if it does not, an agency may properly certify.

In *Mid-Tex*, the proposed regulation's applicability to small businesses is akin to the FERC regulation's applicability to the generating utilities themselves, not their customers, as EPA seems to believe. Generating utilities were an intervening actor between the regulatory agency and the small business customers; the utilities had a substantial amount of discretion as to whether they would pass on their construction costs to their small entity customers and, if so, how much of those costs they would pass on.

Such is not the case with this rule. First, there is no intervening regulated actor. In *Mid-Tex,* the generating utilities were the entities regulated and bound by FERC guidelines, and it was not certain that they would pass on the costs of the new guidelines to their small business customers. In the current case, the Clean Water Act and the revised definition proposed in this rule directly determine permitting requirements and other obligations. It is unquestionable that small businesses will continue to seek permits under the Clean Water Act. Therefore they will be subject to the application of the proposed definition and the impacts arising from its application.

Second, the rule defines the scope of jurisdiction of the Clean Water Act without any discretion left to any entity or intermediary. The rule does not, for example, set a goal for which types or how many waters must be included in jurisdiction, leaving the Corps or states to determine the exact definition of waters of the United States in particular instances. This rule establishes the definition and all small entities are bound by it.

In *American Trucking*,[36] the EPA's certification of rules to establish a primary national ambient air quality standard (NAAQS) for ozone was challenged. The basis of the EPA's certification was that the NAAQS regulated small entities indirectly through state implementation plans. The rules gave states broad discretion to determine how to achieve compliance with the NAAQS.[37] The rules *required* EPA to approve any state plan that met the standards; it could not reject a plan based upon its view of the wisdom of a state's choices.[38] Under these circumstances, the court concluded that EPA had properly

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[33] 773 F.2d at 342.
[34] Id. The generating utilities were not required to pass on the rate increases and in some cases were limited by state law in how much of the rate increase could be passed on to customers.
[35] Id.
[36] 175 F.3d 1027 (D.C. Cir. 1999).
[37] Id.
[38] Id. at 1044.

certified because any impacts to small entities would flow from the individual states' actions and thus be indirect.[39]

EPA's proposed rule is distinguishable from the regulations at issue in *American Trucking*. The states were intervening actors with broad discretion regarding how to implement the federal standards. The EPA rules only told the states what the goal was; the states were left to develop the plans that would implement those goals and thereby impose impacts on small businesses.[40] In the current case, the agencies are not defining a goal nor are they authorizing any third party to determine the means and methods for reaching the goal. To the contrary, the agencies are defining the term governing the applicability of their own CWA programs. A change in the scope of the definition of "waters of the United States" necessarily leads to an increase in the scope and impact of the CWA since the programs thereunder only apply to waters that fall within this definition. The agencies, not a third party, determine whether a given body of water is within the jurisdiction of the requirements of the Clean Water Act and therefore subject to it.

Small businesses have also provided specific examples of how this rule will directly impact them. For example, during a May hearing of the U.S. House of Representatives Committee on Small Business, Jack Field of the Lazy JF Cattle Co. testified that the rule would essentially eliminate an exemption for normal farming practices that he relies upon to do things such as building a fence to control his grazing cattle.[41] The proposed rule would eliminate the exemption for farmers whose actions do not comply with Natural Resources Conservation Services standards.[42]

Small entities in the utility industry have expressed that this proposed rule could eliminate the advantages of Nationwide Permit 12 – Utility Line Projects (NWP 12). Utility companies use NWP 12 to construct and maintain roads that provide access to the utility grid. Under NWP 12 a "single and complete" project that results in less than a ½ acre loss of waters of the U.S. is allowed to proceed under NWP 12 rather than obtain an individual CWA permit.[43] Currently, each crossing of a road over a water of the U.S. is treated as a "single and complete" project. The proposed rule creates large areas in which NWP 12 could no longer be used at all. Under this proposed rule waters in the same riparian area or floodplain all become adjacent waters and therefore waters of the U.S. If all of the waters in the riparian area or floodplain are treated as one interconnected water of the U.S. it would be virtually impossible for small utility companies to use NWP 12. Small utilities would need to apply for the more costly and time consuming individual

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[39] Id. at 1045.
[40] Id. at 1044.
[41] Testimony of Jack Field, Owner Lazy JF Cattle Co. at U.S. House of Representatives Committee on Small Business Hearing entitled "Will EPA's Waters of the United States Rule Drown Small Businesses?", May 29, 2014 at http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=373099.
[42] 79 Fed. Reg. at 22,194; Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices,79 Fed. Reg. 22,276.
[43] Reissuance of Nationwide Permits, 77 Fed. Reg. 10195 (February 21, 2012).

permits. This is a direct cost imposed solely as a result of the changes to the definition of the term "waters of the United States" proposed in this rule.

These examples, as well as comments that Advocacy has received from small entities in other industries, demonstrate that the impact of the proposed rule will be direct. Therefore, the agencies are required to measure the impacts of the rule and to determine whether those impacts are significant for a substantial number of small entities.

C. The Rule Will Have a Significant Economic Impact on Small Businesses

The economic analysis clearly indicates that this rule is likely to have a significant economic effect on small businesses. In the analysis, the agencies examine the anticipated changes to permitting under CWA Section 404 (development projects that discharge dredge or fill materials into waters of the U.S.). They find that in current practice 98 percent of streams and 98.5 percent of wetlands meet the definition of waters of the U.S.;[44] under the revised definition these figures rise to 100 percent.[45] They find zero percent of "other waters" (the seventh category in the revised definition) to be covered in current practice, but the revised definition would cover 17 percent of this category.[46] The agencies evidence an understanding that this increase in jurisdiction will lead to greater costs stating, "A change in assertion of CWA jurisdiction could result in indirect costs of implementation of the CWA 404 program: a greater share of development projects would intersect with jurisdictional waters, thus requiring the sponsors of those additional projects to obtain and comply with CWA 404 permits."[47]

The agencies estimate that CWA 404 permit costs would increase between $19.8 million and $52.0 million dollars annually, and they estimate that section 404 mitigation costs would rise between $59.7 million and $113.5 million annually.[48] These amounts do not reflect additional possible cost increases associated with other Clean Water Act programs, such as Section 402 permitting or Section 311 oil spill prevention plans.[49] The agencies further state that the economic analysis done with respect to the 404 program increase is likely not representative of the changes that may occur with respect to 402 and 311 permitting,[50] leaving small businesses without a clear idea of the additional costs they are likely to incur for these Clean Water Act programs.

The economic analysis also singles out a particular class of businesses potentially affected by the revised definition, yet fails to evaluate any of these potential effects. EPA acknowledges that "a large portion of traditional 402 permit holders are located nearby large water sources to support their operations."[51] The agencies do not identify how many

[44] Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 11 (March 2014).
[45] Id.
[46] Id.
[47] Id. at 13. Advocacy disagrees with the agencies' assertion that this cost is indirect (see above).
[48] Id. at 16.
[49] Id. at 12.
[50] Id.
[51] Id.

of these businesses may be small nor do they discuss the expected impact of this rule on them. Yet this proposed rule would directly affect those small businesses that may be located next to large water sources and which fall within the 3 percent of waters that will be newly included in the definition "waters of the U.S."

Concerns raised by small businesses as well as the agencies' own economic analysis both indicate that small businesses will see a cost increase as a result of the revised definition. The EPA and the Corps have obligations under OMB guidance, and the RFA to measure and communicate this increase. Their certification of no small business impact is inappropriate in light of this information. Because of this probable small business impact, the RFA requires the agencies to complete an IRFA and a SBAR panel.

Conclusion

Advocacy and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the agencies submitted with the rule provides ample evidence of a potentially significant economic impact. Advocacy advises the agencies to withdraw the rule and conduct a SBAR panel prior to promulgating any further rule on this issue.

If we can be of any further assistance, please contact Kia Dennis, Assistant Chief Counsel, at (202) 205-6936.

Thank you for your attention to this matter.

Sincerely,

/s/ Winslow Sargeant, Ph.D.

Chief Counsel for Advocacy

/s/ Kia Dennis

Assistant Chief Counsel

/s/ Stephanie Fekete

Legal Fellow

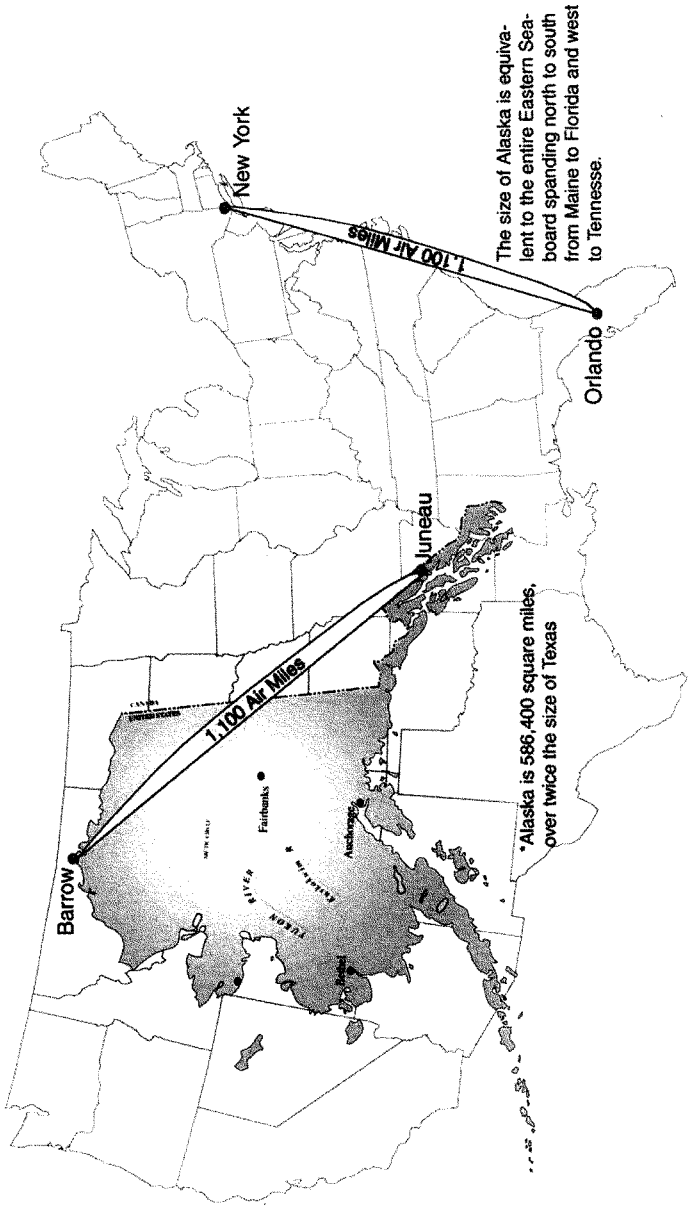
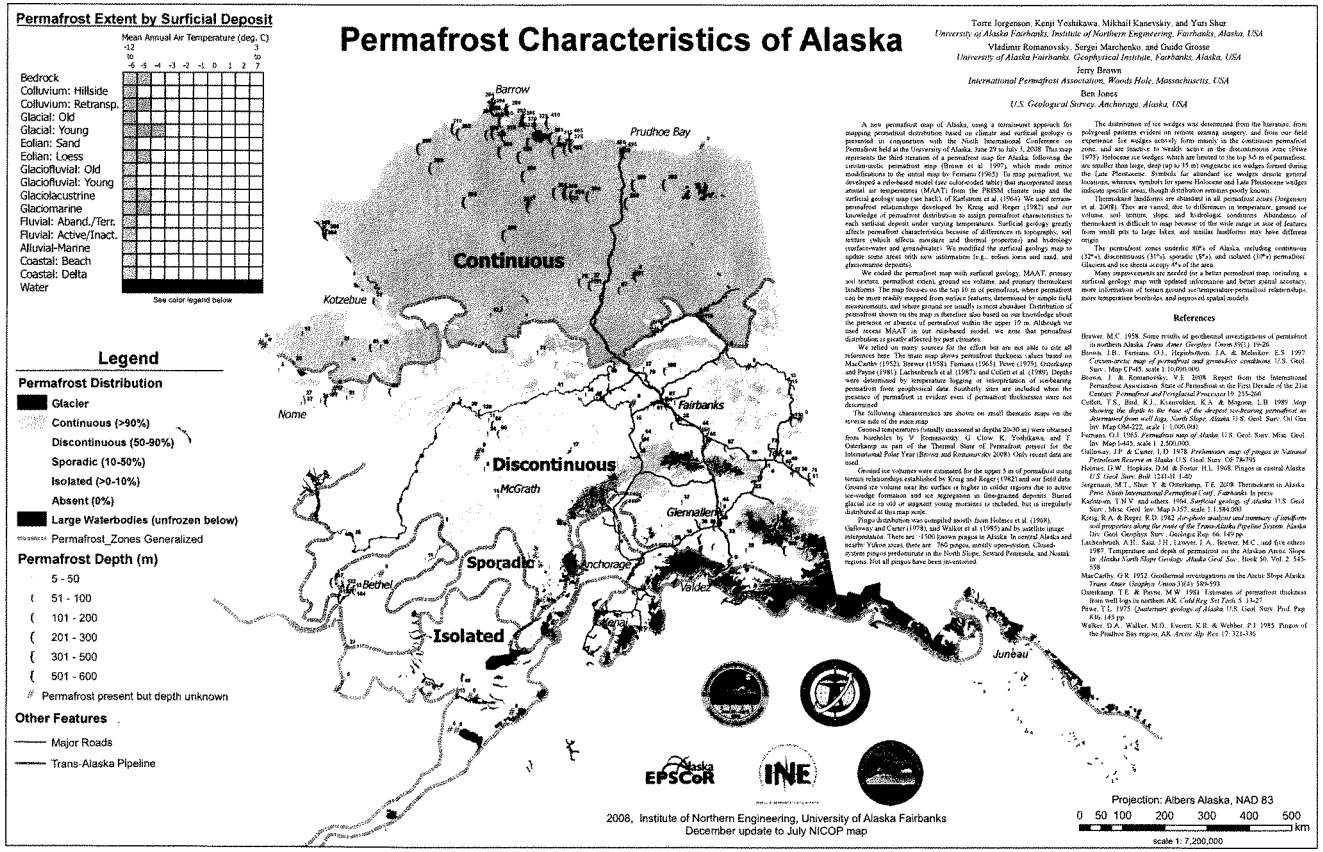


Figure 1. Comparison of Alaska's Land Size to the Contiguous United States and Indication of the Regional Variability Across Such a Large Area (http://www.usmarshals.gov/district/ak/general/information.htm).



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A new permafrost map of Alaska, using a circumpolar approach for mapping permafrost distribution based on climate and surficial geology is presented in conjunction with the Ninth International Conference on Permafrost held at the University of Alaska, June 29 to July 3, 2008. This map represents the third iteration of a permafrost map for Alaska. Following the circum-arctic permafrost map (Brown et al. 1997), which made minor modifications to the initial map by Ferrians (1965). To map permafrost, we developed a rule-based model (see rule-encoded table) that incorporated mean annual air temperatures (MAAT) from the PRISM climate map and the surficial geology map (see back), of Karlstrom et al. (1964). We used terrain-permafrost relationships developed by Kreig and Reger (1982) and our knowledge of permafrost distribution to assign permafrost characteristics to each surficial deposit under varying temperatures. Surficial geology greatly affects permafrost characteristics because of differences in topography, soil texture (which affects moisture and thermal properties) and hydrology (surface-water and groundwater). We modified the surficial geology map to update some areas with new information (e.g., eolian loess and sand, and glaciomarine deposits).

We coded the permafrost map with surficial geology, MAAT, primary soil texture, permafrost extent, ground ice volume, and primary thermokarst landforms. The map focuses on the top 10 m of permafrost, where permafrost can be most readily mapped from surface features, determined by simple field measurements, and where ground ice usually is most abundant. Distribution of permafrost shown on the map is therefore also based on our knowledge about the presence or absence of permafrost within the upper 10 m. Although we used recent MAAT in our rule-based model, we note that permafrost distribution is greatly affected by past climates.

We relied on many sources for the effort but are not able to cite all references here. The main map shows permafrost thickness values based on MacCarthy (1952), Brewer (1958), Ferrians (1965), Péwé (1975), Gunderkamp and Payne (1981), Lachenbruch et al. (1987), and Collett et al. (1989). Depths were determined by temperature logging or interpretation of ice-bearing permafrost from geophysical data. Northerly sites are included where the presence of permafrost is evident even if permafrost thicknesses were not determined.

The following characteristics are shown on small thematic maps on the reverse side of the main map.

Ground temperatures (usually measured at depths 20-30 m) were obtained from boreholes by V. Romanovsky, G. Clow, K. Yoshikawa, and T. Osterkamp as part of the Thermal State of Permafrost project for the International Polar Year (Brown and Romanovsky 2008). Only recent data are used.

Ground ice volumes were estimated for the upper 5 m of permafrost using terrain relationships established by Kreig and Reger (1982) and our field data. Ground ice volume near the surface is higher in colder regions due to active ice-wedge formation and ice segregation in fine-grained deposits. Buried glacial ice to old or stagnant young moraines is included, but is irregularly distributed at this map scale.

Pingo distribution was compiled mostly from Holmes et al. (1968), Galloway and Carter (1978), and Walker et al (1987) and by satellite image interpretation. There are ~1500 known pingos in Alaska. In central Alaska and nearby Yukon areas, there are ~760 pingos, mostly open-system. Closed-system pingos predominate in the North Slope, Seward Peninsula, and Noatak regions. Not all pingos have been inventoried.

The distribution of ice wedges was determined from the literature, from polygonal patterns evident on remote sensing imagery, and from our field experience. Ice wedges actively form mainly in the continuous permafrost zone, and are sensitive to wildfire active in the discontinuous zone (Péwé 1975). Holocene ice wedges, which are limited to the top 3-5 m of permafrost, are smaller than large, deep (up to 35 m) syngenetic ice wedges formed during the Late Pleistocene. Symbols for abundant ice wedges denote general locations, whereas, symbols for sparse Holocene and Late Pleistocene wedges indicate specific areas, though distribution remains poorly known.

Thermokarst landforms are abundant in all permafrost zones (Jorgenson et al. 2008). They are varied, due to differences in temperature, ground ice volume, soil texture, slope, and hydrologic conditions. Abundance of thermokarst is difficult to map because of the wide range in size of features, from small pits to large lakes, and similar landforms may have different origin.

The permafrost zones underlie 80% of Alaska, including continuous (32%), discontinuous (31%), sporadic (9%), and isolated (10%) permafrost. Glaciers and ice sheets occupy 4% of the area.

Many improvements are needed for a better permafrost map, including a surficial geology map with updated information and better spatial accuracy, more information of terrain ground ice/temperature-permafrost relationships, more temperature boreholes, and improved spatial models.

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April 4, 2015

On behalf of the Alaska Association of REATLORS®, thank you for holding this critically important hearing on the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) proposed "Waters of the United States" regulation. Current rules now in effect already impact home sales in Alaska; this proposal would only exacerbate situation like the one described below. Please accept the attached statement by the million-member National Association of REALTORS®, which outlines the proposed rule's impact on real estate. We urge Congress to step in and stop EPA and the Corps from moving forward with this misguided proposal.

As NAR's statement documents, the EPA/Corps' proposal does not bring clarity or certainty to real estate transactions. It would, however, eliminate the Supreme-Court imposed requirement for EPA to justify most of its regulatory decisions with site specific data and analysis. Instead, the burden of proof would be shifted to Alaska's homeowners to dispute an EPA's decision without providing them with the critical guidance they need to avoid expensive, time consuming permits under the Clean Water Act.

Take a recent housing sale that recently fell through over a wetlands determination in Eagle River, Alaska. The owners listed a 4-acre parcel of land for sale which is near but not on a perennial river. The owners, a retired postal service worker and his wife on a fixed income, were moving to Florida to live out their golden years in a warmer climate. They had an interested buyer until the buyer received their disclosure that the lower half of the property may have wetlands.

Given the buyer's negative reaction to this news, the owner tried to salvage the deal by dropping the price $35,000 and also seeking clarification from the Corps that the buyer could build on the northern half of the lot without having to get a federal permit. What he got back from the Corps was the following:

> *"The parcel is a matrix of streams, wetlands, and uplands, with the south portion of the parcel having more of uplands present on the parcel. When you plan to develop the lot, a more comprehensive delineation would be recommended."*

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The buyer then approached an engineer who quoted $5,500 just to "delineate" the wetland – not to develop a permit or negotiate with the Corps for exclusion but to come out, take samples and write a short report. "Functional assessment of wetlands, coordination with the Corps, and development of permit applications" were beyond the scope of work. The $5,500 fee also did not guarantee that the buyer would not have to then go through the permit process. There was no assurance that the Corps would agree with the engineer's findings. Even had the Corps agreed with the engineer, nowhere do the regulations spell out what that buyer could and could not do in the future without having to first consult the Corps. The confusion and uncertainty was simply too much for the buyer. The parcel remains on the market while the sellers have long since moved to Florida.

The stated purpose of the EPA/Corps proposal is "clarity," but all it would do is guarantee that virtually every ephemeral stream and nearby "wetland" or pond is under U.S. jurisdiction. The only exception would be when a homeowner decides to hire an expensive engineer and roll the dice that they could convince the Corps that the lot does not contain and is not located near a wetland, a description which pretty much excludes a large portion of Alaska.

If the EPA is truly interested in clarity, a far more effective approach would be to streamline the permit process and provide guidance spelling out the full list of activities like mowing grass and trimming trees that don't trigger the need for a permit or citizen suits under the Clean Water Act.

Thank you again for holding this hearing.

Sincerely,

Angie Tallant, President
Alaska Association of REALTORS®

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STATEMENT OF THE

NATIONAL ASSOCIATION OF REALTORS®

SUBMITTED FOR THE RECORD TO

THE UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS SUBCOMMITTEE ON FISHERIES, WILDLIFE AND WATER

FIELD HEARING TITLED

IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS

APRIL 6, 2015

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EQUAL HOUSING OPPORTUNITY

INTRODUCTION

On April 21, 2014, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) proposed to reduce the amount of scientific analysis needed in order to declare a "water of the U.S." including wetlands on private property across the country. On behalf of 1-million members involved in all aspects of commercial and residential real estate, the National Association of REALTORS® (NAR) thanks you for holding this oversight hearing and for the opportunity to submit these written comments for the record. If enacted, this rule could force many homeowners across America to obtain a federal construction permit for the first time which could have significant multiplier effects on home sales, values as well as the communities' tax base. We urge the Congress to take immediate action to reign in and prevent this EPA overreach of congressional authority.

Currently before declaring a water of the U.S., the agencies must first conduct a "significant nexus" analysis for each stream or wetland to determine that regulation could prevent significant pollution from reaching an ocean, lake or river that is "navigable," the focus of the Clean Water Act. Because, in the agency's view, a full-blown scientific analysis for each water or wetland is "so time consuming and costly," the agencies are proposing instead to satisfy this requirement with a more generic and less resource intensive "synthesis" of academic research showing "connectivity" between streams, wetlands and downstream water bodies. On this basis, the agencies believe that they can waive the full analysis before regulating most of streams and wetlands, and reduce the analysis for any "other water" that has more than a "speculative or insubstantial" impact. We disagree.

NAR opposes this vague and misguided "waters of the U.S." proposed regulation. While perhaps an administrative inconvenience, site-specific data and analysis forces the agencies to justify their decision to issue wetland determinations on private property and focus on significant impacts to navigable water. By removing the analytical requirement for regulation, the agencies will make it easier not only to issue more determinations but also force these property owners to go through a lengthy federal negotiation and broken permit process to make certain improvements to their land.

At the same time, the proposal does not 1) delineate which improvements require a federal permit, 2) offer any reforms or improvements to bring clarity or consistency to these permit requirements, or 3) define any kind of a process for property owners to appeal U.S. water determinations based on "insubstantial" or "speculative" impacts. The resulting lack of certainty and consistency for permits, or how to appeal "wetland determinations," will likely complicate real estate transactions such that buyers will walk away from the closing table or demand price reductions to compensate for the hassle and possible transaction costs associated with these permits. We urge Congress to stop these agencies from moving forward with this proposal until they provide a sound scientific basis for the regulatory changes and also streamline the permitting process to bring certainty to home- and small-business owners where wetlands are declared.

PROPOSED RULE ELIMINATES THE SOUND SCIENCE BASIS FOR U.S. WATER DETERMINATIONS

Today, the EPA and Army Corps may not regulate most "waters of the U.S.," including wetlands, without first showing a significant nexus to an ocean, lake or river that is navigable, the focus of the Clean Water Act. "Significant nexus" is a policy and legal determination based on a scientific site-specific investigation, data collection and analysis of factors including soil, plants, and hydrology.

The agencies point to this significant nexus analysis as the reason they are not able to enforce the Clean Water Act in more places like Arizona and Georgia.[1] On its website, EPA supplies these "representative cases" where it's currently "so time consuming and costly to prove the Clean Water Act protects these rivers." EPA also documents the "enforcement savings" from the proposal in its economic analysis.[2] None of these major-polluter examples involve home or small business owners, which typically do not own significant acreage (the typical lot size is a ¼ acre)[3], let alone disturb that amount of wetland with a typical home project.

Under this proposal, the agencies would waive the site-specific, data-based analysis before regulating land use on or near most streams and wetlands in the United States (see table 1). The proposal:

- Creates two new categories of water – i.e., "all tributaries" and "adjacent waters."
- Adds most streams, ponds, lakes, and wetlands to these categories. "Tributary" is anything with a bed, bank and "ordinary high water mark," including some "ditches." "Adjacent" means within the "floodplain" of the tributary, but the details of what constitutes a floodplain, like how large an area (e.g., the 5-year or 500 year floodplain), are left to the unspecified "best professional judgment" and discretion of agency permit writers.
- Moves both categories from column B (analysis required for regulation) to column A (regulated without site specific data and analysis).

[1] http://www2.epa.gov/uswaters --for links to the examples, click "Enforcement of the law has been challenging."
[2] http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf
[3] American Housing Survey, 2009.

Table 1. Proposed changes to "Waters of the U.S." regulatory definition

Column A **(Regulated without analysis)**	**Column B** **(Analysis required for regulation)**

Navigable or Interstate
 	
• The Ocean
• Most Lakes
• Most Rivers
 	
Non-Navigable and Intrastate
 	
• **All** ~~**Some**~~ Tributaries (Streams, Lakes, Ponds)
  o Perennial
  o Seasonal
  o **Ephemeral**
• **Most** ~~**Some**~~ Wetlands
  o Adjacent to navigable water
  o **Adjacent to** ~~**Directly Abutting**~~ covered stream
	Non-Navigable and Intrastate
	
	• ~~**Rest of the Tributaries**~~
	  o ~~**Ephemeral**~~
	• Rest of Wetlands
	  o ~~**Adjacent to tributary**~~
	  o Not adjacent
	• Any other water
	  o ~~**Adjacent to navigable water**~~
	  o ~~**Adjacent to tributaries**~~
	  o Not-adjacent

For any remaining or "other water," the agencies would continue regulating case-by-case using a significant nexus analysis. However, the amount of analysis is dramatically reduced. Under this proposal, all agency staff would have to show is more than a "speculative or insubstantial" impact to navigable water. If, for instance, there were many wetlands within the watershed of a major river, no further analysis would be required to categorically regulate land use within any particular wetland with that river's watershed. Also, the data and analysis from already regulated water bodies could be used to justify jurisdiction over any other "similarly situated" water without first having to visit the site and collect some scientific data.

Contrary to agency assertions, this proposal does not narrow the current definition of "waters of U.S."

- While technically not adding "playa lakes," "prairie potholes," or "mudflats" to the definition, the proposal does remove the analytical barrier which, according to EPA, is preventing both agencies from issuing U.S. waters determinations on private property in more places including Arizona and Georgia.
- Codifying longstanding exemptions (prior converted crop land and waste treatment) does not reduce the current scope of definition; it simply writes into regulation what the agencies have already been excluding for many years.
- Giving up jurisdiction over "ornamental" (bird baths), "reflecting or swimming pools" is not a meaningful gesture, as it's doubtful that any court would have let them regulate these, anyway.
- It is not clear that many ditches would meet ALL of the following conditions – i.e., wholly excavated in uplands AND drains only uplands AND flows less than year-round -- or never ever connects to any navigable water or a tributary in order to qualify for the variance. Also, the term "uplands" is not defined in the proposal so what's "in or out" is likely to be litigated in court, which does not provide certainty to the regulated community.

LITERATURE REVIEW AND SYNTHESIS DOES NOT SUPPORT THE PROPOSED RULE

In lieu of site-specific, data-based analysis, the EPA and the Corps are proposing to satisfy the significant nexus requirement with a less resource intensive "synthesis" of academic studies. The agencies believe these studies show "connectivity" between wetlands, streams and downstream water bodies, and that's sufficient in their view to justify and waive the full analysis for land-use regulations on or within the floodplain of one of these waters.

However, this synthesis is nothing more than a glorified literature review.[4] EPA merely compiles, summarizes and categorizes other studies, and labels them a "synthesis." EPA conducts no new or original science to support or link these studies to its regulatory decisions. Three quarters of the citations included were published before the Supreme Court's decision in Rapanos v. U.S. (2006), and the rest appear to be more of the same. It breaks no new ground. The Supreme Court did not find this body of research to be a compelling basis for prior regulatory decisions, either in Rapanos or SWANCC v. the Army Corp (2001). Putting a new spin on old science does not amount to new science.

[4] For EPA's synthesis: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345

In addition, scientists with GEI Consultants[5] reviewed the literature synthesis and concluded that these studies do not even attempt to measure, let alone support a significant nexus finding. According to GEI,

> "Most of the science on connectivity … has been focused on measuring the flow of resources (matter and energy) from upstream to downstream. …[T]hese studies have not focused on *quantifying the ecological significance* of the input of specific tributaries or headwaters, alone or in the aggregate, and ultimately whether such effects could be linked directly and causally to impairment of downstream waters." [6]

Knowing how many rocks downstream came from upstream won't tell you what the Supreme Court determined needs to be known, which is how many times rocks can be added before downstream water becomes "impaired" under the Clean Water Act. Asking the Science Advisory Board if the synthesis supports the first conclusion (i.e., some rocks come from upstream) doesn't answer the second (how many times can rocks be added downstream before significantly impacting the water's integrity?). EPA is asking entirely the wrong set of policy questions. As GEI puts it,

> "The Science Advisory Board (SAB) charge questions were of such limited scope that they will do little to direct the Synthesis Report toward a more useful exploration of the science needed to inform policy … The questions will not provide the SAB panel with needed directive to require substantive revisions to the report such that it … inform(s) policy with regard to Clean Water Act jurisdiction."[7]

THERE IS NO SUBSTITUTE FOR SITE-SPECIFIC DATA & ANALYSIS TO DETERMINE U.S. WATERS

Here's how EPA's synthesis of generic studies stacks up against a more targeted study specific to and based on data for each stream or wetland.

[5] For GEI's credentials, see: http://www.geiconsultants.com/about-gei-1
[6] For NAR's summary and link to GEI's comments: http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report
[7] For NAR's summary and link to GEI's comments: http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report

Table 2. EPA synthesis of research versus significant nexus analysis

Significant Nexus	Synthesis of Research
Proves that regulation of a stream or wetland will prevent pollution to an ocean, lake or river	Shows *presence* of a connection between streams, wetlands, and downstream, and not *significance*
Shows how much matter/energy can be added to a tributary or wetland before the Act applies	Shows how much of the matter/energy moved from upstream to downstream
Based on site specific data and analysis of soil, plants, hydrology, and other relevant factors	Dependent upon whatever data and analysis academics have used for their connectivity study
Requires an original scientific investigation, data and analysis for each water body to be regulated	Includes no new or original science by agencies; it's a literature review
Relies on timely and water-body-specific facts, data and analysis	Relies on substantially the same body of research which the Supreme Court didn't find compelling

The EPA may not want to "walk the nexus" and collect data on soil, plants and hydrology, but it's forced the Agency to justify their regulatory decisions, according to the staffs' own interviews with the Inspector General:[8]

- "Rapanos has raised the bar on establishing jurisdiction."
- "...lost one case ... because no one walked the property..."
- "...have to assemble a considerable amount of data to prove significant nexus."
- "...many streams have no U.S. Geological Survey gauging data."
- "...need several years of biotic observations...."
- "...there is currently no standard stream flow assessment methodology."

[8] Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation, Report No. 09-N-0149 (April 30, 2009). For a link: http://www.epa.gov/oig/reports/reportsByTopic/Enforcement_Reports.html

- "...biggest impact is out in the arid West, where it is comparably difficult to prove significant nexus."

As a result, many U.S. water determinations (which would not previously have been questioned) are now being reviewed and are not holding up to either EPA or Justice Department scrutiny. Again, from the EPA interviews:

- "Of the 654 jurisdictional determinations [in EPA region 5] ... 449 were found to be non-jurisdictional."
- "An estimated total of 489 enforcement cases ... [were] not pursued ... case priority was lowered ... or lack of jurisdiction was asserted as an affirmative defense..."
- "In the past, everyone *just assumed* that these areas are jurisdictional" (emphasis added).

"Walking the nexus" may be an administrative inconvenience, but the data don't support an approach based on 'just assuming.' The main reason for the site-specific, data-based analysis is that it provides a sound scientific basis for agency regulatory decisions. Analysis also raises the cost of unjustified U.S. water determinations. It forces the agencies to do what Congress intended, which is to focus on waters which are either a) in fact navigable or b) significantly impact navigable water. It also prevents agencies from regulating small businesses or homeowners that are not major contributors to navigable water quality impairment.

PROPOSED RULE WILL OVERCOMPLICATE ALREADY COMPLEX REAL ESTATE TRANSACTIONS

Small-business and homeowners are not the problem. Few own enough property to be able to disturb a 1/2-acre of wetland, which is how the Nationwide 404 Permit Program defines *de minimis* impact to the environment. The typical lot size is a ¼ acre with three-quarters having less than an acre.[9] None of the big polluter examples EPA presents involves a homeowner or small business. Yet, by removing the analytical barrier to regulation, agencies will be able to issue more U.S. water determinations on private properties in more places like Arizona, Georgia or wherever else it's now "too time consuming and costly to prove the Clean Water Act protect these rivers," according to the EPA.[10]

The home buying process[11] will not work unless there is sufficient property information to make informed decisions. This is why buyers are provided with good faith estimates and disclosures about

[9] American Housing Survey, 2009.
[10] http://www2.epa.gov/uswaters -- for the examples, click on "Enforcement of the law has been challenging"
[11] In previous comments, the International Council of Shopping Centers, National Association of Homebuilders, NAR and others have thoroughly documented the commercial and homebuilding impacts of the U.S. waters proposed rule. In this statement, NAR focuses on the impact to existing homeowners which have not been documented.

material defects and environmental hazards. It is why they are entitled to request a home inspection by a professional before making decisions. It is also why there's such a thing as owner's title insurance. Contracts and legal documents have to be signed to ensure that buyers receive full information and understand it. Later, you can sue if the property isn't as advertised or there are misrepresentations.

The "waters of the U.S." proposal introduces yet another variable – letters declaring wetlands on private property – into an already complicated home buying process. By removing the analytical requirement before issuing one of these letters, the agencies will make it easier to issue more of them and in more places. The problem is each letter requires the property owner to get a federal permit in order to make certain improvements to their land. But they don't know which improvements require a permit. Those aren't delineated anywhere in the proposal. If on the other hand, they take their chances and don't initiate a potentially lengthy federal negotiation as part of a broken permit process, they could face civil fines amounting to tens of thousands of dollars each day and possibly even criminal penalties.

Also, what's required can vary widely across permits – even within the same district of the Corps. No one will inform you where the goal posts are; just that it's up to you and they'll let you know when you get there. Often, applicants will go through this year-long negotiation only to submit the permit application, find that staff has turned over and they have to start over with a new staffer who has completely different ideas about how to rewrite the permit.

While more U.S. waters letters could be issued under this proposal, the agencies do not provide the detailed information needed for citizens to make informed decisions about these letters. The letter could state for instance: "the parcel is a matrix of streams, wetlands, and uplands" and "when you plan to develop the lot, a more comprehensive delineation would be recommended." Real estate agents will work with sellers to disclose this information, but buyers won't know which portion of the lot can be developed, what types of developments are regulated, or how to obtain the permit. They may consult an attorney about this but will most likely be advised to hire an engineer to "delineate" the wetlands without being told what that means. And even if this step is taken, there is no assurance that this analysis will be accepted by the agency or that a permit will ever be issued.

The potential for land-use restrictions and the need for costly permits will increase the cost of home ownership and make regulated properties less attractive to buyers. Of two homes, all else equal (lot size, number of rooms, etc.), the one with fewer restrictions should have higher property value.[12]

[12] There is strong empirical data to support this proposition, although economists may disagree. For instance:

- E.L. Glaeser, and B.A. Ward, The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston. Journal of Urban Economics 65 (2009) 265-278.

However, before buying, the buyer will want to know in exactly which ways the property could be restricted as well as how much those restrictions could cost (time, effort, money). They will need this information when weighing whether to come to the closing table and deciding how much to ask in reducing listing price in order to compensate for the hassle of a potential federal negotiation for each unspecified improvement on the property they're considering purchasing.

To illustrate the point, after Congress revised the flood insurance law, many buyers refused to consider floodplain properties not due to the actual insurance cost but because they read in a newspaper about $30,000 flood insurance premiums. Others negotiated reduced sales prices because they feared the property was "grandfathered", and they could potentially see their rates skyrocket, even when, in fact, the home was not grandfathered and the provision of concern had not taken effect and would not for several years. While it may be entirely true that the proposed rule will not cover all homes in a floodplain (only those where a U.S. water is filled) nor regulate such normal home projects as mowing grass and planting flower beds, the takeaway from the flood insurance experience is that buyers make decisions based on fear and uncertainty, both real and *imagined.*

In the case of wetlands, buyers have legitimate reason for concern. Many will have heard the horror story of the Sacketts in Priest Lake, Idaho, who were denied their day in court when they questioned a wetlands determination.[13] Others just south of here in Hampton Roads, Virginia, will read the cautionary tales of buyers suing sellers over lack of wetlands disclosures[14] or neighbor-on-neighbor water wars for mowing grass or planting seedlings.[15] Some might even have a neighbor to two who've been sued over the years for tree removals or grading (e.g., Catchpole v Wagner[16]). This all reinforces the need for the EPA and the Corps to provide more information rather than less about the rule, what it does and does not do, and provide as much detail as possible all upfront.

So far the agencies have responded by breaking up the rulemaking process into two parts, and putting forward only the first. This proposal, which clarifies "waters of the U.S.," determines "who is regulated." The issue here is whether site-specific data and analysis is required before a wetlands letter is issued. "What is regulated" is not a part of this proposal. Nor does the proposal lay out the full range of home projects that trigger a permit. The wetland permitting process itself is an entirely separate rulemaking. The issue there is what exactly I must do when I get one of these letters and how to appeal it.

- K.R. Ihlanfeldt, The Effect of Land Use Regulation on Housing and Land Prices. Journal of Urban Economics 61 (2007) 420-435.

[13] For the chilling facts of case, see: http://www.pacificlegal.org/Sackett

[14] http://hamptonroads.com/2010/05/cautionary-tale-wetlands-violations-will-cost-you

[15] http://hamptonroads.com/2012/05/newport-news-gets-swamped-wetlands-dispute

[16] 210 US Dist LEXIS 53729, at *1 (W.D. Wash. 2010)

Based on a report by the Environmental Law Institute (ELI),[17] that permitting process is broken and needs reform and streamlining to provide some consistency, timeliness, and predictability. But any comments or suggestions about this have been deemed non-germane and will not be considered by the agencies in the context of a "waters of the US" proposal. Because the agencies have decided to play a regulatory shell game with the "who" vs. the "what," property owners have been put in an untenable position of commenting on a regulation without knowing its full impact. Those who own a small business will be denied the opportunity under another law to offer significant alternatives that could clarify or minimize the proposed "waters of U.S." impact while still achieving the Clean Water Act's objectives.[18]

These are some property buyer questions which are not answered by the immediate proposed rule:

- What is the full range of projects that will require a federal permit?
- What can I do on my property without first having to get a permit?
- What do I have to do to get one of these permits?
- What's involved in the federal application process?
- What information do I have to provide and when?
- How long will the permit application take?
- How will my project and application be evaluated?
- What are the yardsticks for avoiding or minimizing wetlands loss?
- What are the full set of permit requirements and conditions?
- Are there changes I can make in advance to my project and increase my chances of approval?
- Can I be forced to redesign my home project?
- What kinds of redesigns could be considered?
- What if I disagree with the agency's decision, can I appeal?
- What exactly is involved in that appeal?
- What do I have to prove in order to win?
- Will I need an attorney? An engineer? Who do I consult?
- And how much will all this cost me (time, efforts, money)?

The "Waters of the U.S." proposal creates these uncertainties into the property buying process.

Uncertainty #1: The "waters of the U.S." proposal does not tell me what I can and cannot do on my own property without a federal permit.

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[17] http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience

[18] For EPA's justification against conducting a small business review panel under the Regulatory Flexibility Act, see: 79 Fed. Reg. 22220 (April 21, 2014).

Not all property owners in the floodplain will be regulated, only those who conduct regulated activities. Again, that information is not found in the "waters of U.S." proposal, and there is not much more in the decision documents from the previous regulation for the "nationwide" (general) permit program (2012). The general permit for commercial real estate (#39) is separate from residential (#29), but both include a similarly vague and uber-general statement about what's regulated:

> "Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development)."[19]

However, construction projects are not the only ones that may require a permit. For example, home owners have been sued for not obtaining one to perform these activities:

- Landscaping a backyard (Remington v. Matheson [neighbor on neighbor])
- Use of an "outdated" septic system (Grine v. Coombs)
- Grooming a private beach (U.S. v. Marion L. Kincaid Trust)
- Building a dam in a creek (U.S. v. Brink)
- Cleaning up debris and tires (U.S. v. Fabian)
- Building a fruit stand (U.S. v. Donovan)[20]
- Stabilizing a river bank (U.S. v. Lambert)
- Removing small saplings and grading the deeded access easement (Catchpole v. Wagner)[21]

Also, the proposal includes exemptions for specific activities performed by farmers and ranchers, but not homeowners or small businesses. The agencies would not have exempted these activities from permits unless they believed these activities could trigger them. Yet, none of these "normal

[19] http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_29_2012.pdf

[20] Note: The defendant lost because he couldn't finance an expert witness to refute the Corps' wetlands determination; under this proposed rule, the Corps would no longer have to provide any data and analysis at all to support its future determinations; the burden would be entirely on the property owner to come up with that data and analysis on their own.

[21] There is an extended history between Catchpole and Wagner over activity on this easement, and the Corps has been repeatedly drawn into the dispute. In one instance the Sheriff was called, and the Corps had to step in and referee that "normal mowing activity" was not a violation that the Corps would pursue under the Clean Water Act. NAR would expect more of these kinds of disputes to arise, should the proposed rule be finalized.

farming" practices appear to be uniquely agricultural, opening up the non-farmers to regulation. Here are a couple of the listed exemptions but the full set can be found on EPA's website.[22]

- Fencing (USDA practice #383)
- Brush removal (#314)
- Weed removal (#315)
- Stream crossing (#578)
- Mulching (#484)
- Tree/Shrub Planting (#422)
- Tree Pruning (#666)

While the proposal could open up more properties to wetlands letters, permits and lawsuits, it does not in any way limit who can sue over which kinds of activities for lack of permits. It does, on the other hand, reduce the amount of data and analysis the Corps or EPA need in order to declare U.S. waters on these properties, and shifts the entire burden to the property owner to prove one these waters do not exist on their property before they can win or get a frivolous case dismissed.

Uncertainty #2: The proposal doesn't tell me how to get a permit, what's required and how long it will take.

Again, the permitting process is not a part of the 'waters of the U.S.' proposal, denying home owners and small businesses an opportunity to comment on the proposed rule's full impact or offer reasonable alternatives that could minimize the impact while protecting navigable and significant nexus waters. EPA's economic analysis on page 16 does provide an estimate of the average cost for a general permit ($13,000 each).

Costs go up from there. The estimate of $13,000 is only for a general permit and for the application alone; it doesn't include re-designing a project to obtain permit approval or the conditions and requirements which can vary widely across permits. While not providing an estimate of the time it takes to get one of these permit, U.C. Berkeley Professor David Sunding found based on a survey that the "[general] permits in our sample took an average of 313 days to obtain."[23] Individual permits can take even longer and be significantly more expensive.

The reason that general permits have the lowest price tag is because they are intended to reduce the amount of paper work and time to start minor home construction projects that "result in minimal adverse environmental effects, individually or cumulatively." One of the conditions for the permit is

[22] http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_404_exempt.pdf
[23] http://areweb.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf

a project may not disturb more than a ½ -acre of wetlands or 300 linear feet of streambed, the Corp's definition of *de minimis*. However, transaction costs and requirements may vary.

The Environmental Law Institute studied the process, and found very little consistency, predictability or timeliness across permits.[24] The process begins with a letter from the agency declaring U.S. water on the property. Home owners may be given a copy of the law, told to submit any "plans to develop the lot", and be reminded that the burden of proof is entirely on them. No examples of how to comply are offered. There might be a check list (which is widely frowned upon) but there is no single definition or yard stick or practical guidance of any sort for the key compliance terms "avoidance," "minimization" and "practicable."

If you ask "which part of my property can I develop?", the answer is "hire an engineer and delineate it." "What if I make these changes to my project before applying?", the answer may be "I'll know it when we see it." There is no standard approach that the Corps follows to evaluate the project. According to the ELI's interviews, it is common for applicants to go through an entire negotiation and upon submitting an application, find staff turned over and the new individual has a completely different concept of what's most important to avoid and the best way to minimize.

The following are more actual quotes by regulators documented in the ELI report:

- "The question is, how much is enough? It's all judgment. It depends on the person's mood and is extremely variable."
- "We ask them to document plans and show how they get to where they are. If I think you can do more, I'm going to show you. The burden is on the applicant to show me where they've been in the journey."
- "I like to be a rule maker with regard to work I've done, but the more I standardize, the more I restrict myself with regard to find possible solutions."
- "[B]ecause judgments on which impacts are more avoidable or more important exists in a grey area, a lot of the decision making within the Corps depends on professional judgment, causing a lot of variability."
- "There are times when the agency will pressure the applicant to do more avoidance or minimization during the permitting process."
- "There are times when they won't sign off because they want a certain thing. That's the subjective aspect and I think that is the way it ought to work."

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[24] For ELI's report, http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience

Permit decisions appear completely subjective, iterative and not uniform across individual applicants. It seems that whatever the agency assumes is necessary to avoid or minimize wetlands loss, goes. If you refuse to provide a single piece of information or don't go along 100% with a proposed design modification, your permit is summarily denied. In at least one example (Schmidt v. the Corps), the agency denied the permit to build a single family home on a lot in part because the Corps identified other lots the land owner owned and his neighbors didn't seem to be objecting to construction on those lots (yet).

For these reasons, the ELI recommended several reforms to the wetlands permit process, including developing guidelines identifying common approaches and quantifiable standards. But at this time, the agencies don't appear interested in sensible recommendations like these, even if it brings some consistency, certainty or reduces the burden on small business or homeowners while still protecting the environment. "Nationwide permits do not assert jurisdiction over waters and wetlands .... Likewise, identifying navigable waters ... is a different process than the NWP authorization process," according to the Corps.[25]

Uncertainty #3: The proposal doesn't tell me what to do if I disagree with an agency decision, or how to prove the Clean Water Act does not apply to my property.

The proposal asserts jurisdiction over any U.S. water or wetland with more than a "speculative or insubstantial" impact on navigable water. Yet, nowhere does this proposal define those terms or a process for how a homeowner may appeal a U.S. water determination based on "insubstantial or speculative" impacts.

The proposal will eliminate the need for agencies to collect data and perform analysis to justify regulation for most water bodies. Before, it was up to the agencies to prove the Clean Water Act applies, but under this proposal, the burden would shift 100% to the property owners to prove the reverse. And the cost will be higher for property owners because (1) they don't have the expertise needed, (2) there is no guidance for delineating "insubstantial/speculative" impacts, and (3) they have not been learning-by-doing these analyses as the agencies have for decades.

Ironically, the rationale for the proposed rule is these agencies cannot justify the taxpayer expense of site specific data and analysis, yet the proposal is forcing individual taxpayers to hire an engineer and pay for the very same analysis themselves or else go through a broken permit process.

[25] 77 Fed. Reg. 10190 (Feb. 21, 2012)

Administrative inconvenience is not a good excuse. If it's too hard for the federal government to do some site visits, data collection and analysis in order to justify their regulations, then perhaps it's simply not worth doing.

Conclusion

Based on the forgoing, NAR respectfully requests that Congress step in and stop these agencies from moving forward with a proposed rule that removes the scientific basis for "waters of U.S." regulatory decisions. It does not provide certainty to taxpayers who own the impacted properties and will complicate property and home sales upon which the economy depends.

Thank you for the opportunity to submit these comments. NAR looks forward to working with committee members and the rest of Congress to find workable solutions that protect navigable water quality while minimizing unnecessary cost and uncertainty for the Nation's property owners and buyers.

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